Supreme Court of the United States

OCTOBER TERM, ~~1967~~ 1965

No. ~~646~~ 17

UNITED STATES, PETITIONER

vs.

RAY F. SPEERS, TRUSTEE IN BANKRUPTCY OF THE KURTZ ROOFING COMPANY, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. A]

No. 15,405

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN THE MATTER OF:

THE KURTZ ROOFING COMPANY,
f/d/b/a KURTZ SUPPLY COMPANY,
Bankrupt.

UNITED STATES OF AMERICA, APPELLANT

v.

RAY F. SPEERS, Trustee in Bankruptcy, APPELLEE

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

APPENDIX B TO BRIEF FOR APPELLANT—filed August 28, 1963

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* * * *

[File Endorsement Omitted]

[fol. 1] In Bankruptcy No. 27,743

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

IN THE MATTER OF:

THE KURTZ ROOFING COMPANY,
f/d/b/a KURTZ SUPPLY COMPANY,
Bankrupt.

DOCKET ENTRIES.

6/20/60. Voluntary Petition and schedules filed in triplicate and referred to Referee.

6/20/60. Two copies of petition and schedule to Referee.

12/11/62. Certificate of Referee on Petition for Review of Order entered June 12, 1962 filed.

12/11/62. Copies of Certificate and notice to Spears, Buckingham, Gosline, Britz, Sowartz and District Director of Internal Revenue.

12/13/62. Stipulation extending time for District Director of Internal Revenue to file brief to 1-2-63 approved and filed. FLK.

1/2/63. Brief on behalf of the United States of America in support of Petition for Review, filed.

1/8/63. Stipulation extending time for Trustee to file brief opposing Petition for Review to Feb. 4, 1963, filed. Notice waived. FLK.

2/1/63. Brief of Trustee in Bankruptcy opposing Petition for Review, filed. Mailed 1/31/63.

3/20/63. Order dismissing Petition for Review, adopting and confirming the Findings and Conclusions of Referee, and confirming Order of Referee, filed and entered. FLK-18. Copies to: Frank Buckingham, Robert B. Gosline, Harland M. Britz, and Buckley D. Sowarts, Internal Rev. Service, Cleveland, Ohio; and T. Kenneth Mattimoe, Referee.

[fol. 2] 4/17/63. Notice of Appeal by United States of America, filed. Copies to: Frank Buckingham, Robert B. Gosline, Ray F. Spears and Referee T. Kenneth Mattimoe.

BEFORE THE REFEREES IN BANKRUPTCY

PROOF OF CLAIM OF THE UNITED STATES.—Filed November 16, 1960

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, being duly sworn, deposes and says that:

1. The Kurtz Roofing Co. is justly and truly indebted to the United States in the sum of $21,633.69 with interest thereon as hereinafter stated;

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

Kind of Tax and Period	*Amount Due*	*Account No.*	*Date Tax Lien Arose*
WFT 3-31-59 including assessed Int.	$3,792.42	60 5 167484	6-3-60
Penalty	888.86		
Accrued Int. to 1-20-61	167.95		
WFT 6-30-59 including assessed Int.	5,585.82	60 5 167487	6-3-60
Penalty	1,328.08		
Accrued Int. to 1-20-61	250.94		
WFT 9-30-59 including assessed Int.	4,770.84	60 5 167486	6-3-60
Penalty	1,150.73		
Accrued Int. to 1-20-61	217.43		
FUTA 1959	470.56	60 9 880038	9-30-60
WFT 12-31-59	2,474.43	60 9 165589	9-30-60
WFT 3-31-60	535.63		

Plus additional interest @ 6% per annum on $16,838.38 from 1-21-60 to date of payment.

3. No part of said debt has been paid and the same is now due and payable at the Office of the District Director of Internal Revenue;

4. There are no set-offs or counterclaims to said debt; [fol. 3] 5. Except for the statutory tax liens which arose on the dates above stated, the United States does not hold, to the deponent's knowledge or belief, any security or securities for said debt;

6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt; and

7. Said debt has priority and must be paid in full in advance of distribution to creditors as and to the extent provided by law:

IN BANKRUPTCY ACT PROCEEDINGS see Sections 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U. S. C. 104, 205(e), 599, 737(2), 855, and 1059).

IN OTHER PROCEEDINGS see Section 3466 of the Revised Statutes (31 U. S. C. 191). Also, attention is invited to Section 3467 (31 U. S. C. 192) with respect to the personal liability of any executor, administrator, or other person who fails to pay the claims of the United States in accordance with their priority.

ROBERT H. GILL,
Chief Special Procedures,
Office of the District Director
of Internal Revenue,
P. O. Box 6902,
Cleveland, Ohio.

BEFORE THE REFEREES IN BANKRUPTCY

NOTICE OF FEDERAL TAX LIEN.—Filed February 9, 1961

Pursuant to the provisions of Sections 6321, 6322, and 6323 of the Internal Revenue Code of 1954, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof re-

main unpaid, and that by virtue of the above-mentioned [fol. 4] statutes the amount of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of Taxpayer—Kurtz Roofing Co., Inc.
Residence or Place of Business—305-307 W. Water St. Sandusky, Ohio

Nature of Tax	*Account No.*	*Year or Taxable Period*	*Assessment Date*	*Amount of Assessment*
WFT	60 5 167484	3/31/59	6/3/60	$4681.28
WFT	60 5 167487	6/30/59	6/3/60	6913.90
WFT	60 5 167486	9/30/59	6/3/60	5921.57
WFT	60 11 290053	12/31/59 DRP	11/30/60	41.23
WFT	60 9 165589	12/31/59	9/30/60	3191.42
WFT	60 9 165588	3/31/60	9/30/60	682.93
FUTA	60 9 880038	1959	9/30/60	606.91
			TOTAL	$22,039.24

WITNESS my hand at Cleveland, Ohio, on this 8th day of February, 1961.

MELVIN J. BURTON,
District Director Internal Revenue,

By (*Signature*) JOHN B. TAGGART,
Acting Group Supervisor.

INTERNAL REVENUE CODE OF 1954

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

[fol. 5] SEC. 6322. PERIOD OF LIEN.

Unless another date is specificaly fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under State or Territorial Laws.—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With Clerk of District Court.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) With Clerk of District Court for District of Columbia.—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) *Form of Notice.*—If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) *Exception in Case of Securities.*—

(1) Exception.—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed

[fol. 6] in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) Definition of Security.—As used in this subsection, the term "security" means any bond debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) *Disclosure of Amount of Outstanding Lien.*—If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

SEC. 6325. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) *Release of Lien.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) Liability Satisfied or Unenforceable.—The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for; or

[fol. 7] (2) Bond Accepted.—There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

BEFORE THE REFEREES IN BANKRUPTCY

NOTICE OF FINAL MEETING OF CREDITORS AND HEARING ON ACCOUNT OF TRUSTEE.—Filed February 16, 1962

Notice is hereby given that a final meeting of creditors of the above-named bankrupt will be held at Room 222, United States Court House in Toledo, Ohio, on March 5, 1962, at 10:00 o'clock A. M.

Creditors are advised that the following is a summary of the administration of the estate taken from the reports and accounts of the trustee and papers filed in these proceedings:

	Priority Claims	*Secured Claims*	*Unsecured Claims*
Debts scheduled	$21941.25	$1199.60	$26400.82
Claims filed & allowed	20806.16	1199.60	22697.98

The following amounts were realized from liquidation of assets:

From sale of personal property	$10365.55
From collection of accounts receivable	6023.86
From bank account	297.14
From cash surrender value of insurance	993.97
Total Receipts	$17680.52

There has been disbursed by the trustee for expenses the following:

[fol. 8]

Auctioneer's commissions & expenses	$ 956.03
Secured claims	1199.60
Use & occupancy	596.75
Storage expense	643.50
Bond premiums	160.00
Towing expense	231.62
Total Disbursements	$ 3787.50
Leaving a present balance on hand of	$13893.02

Property was abandoned as having no equity or being worthless for administration as follows:

Description	*Appraised Value*	*Liens*
Accounts receivable as uncollectible		
26 foot boat	No value	$312.00

That at such meeting there will be heard and considered the following matters and any other matters proper to be considered thereat:

(1) Applications for allowance of fees and expenses as follows:

Trustee's fees	$ 518.61
Trustee's expenses	250.00
Attorney for Trustee fees	750.00
Attorney for Bankrupt fees	405.00
Receiver's fees	316.80

(2) Allowance and ordering payment of priority claims.

(3) Examination, passing upon and confirming the accounts of the trustee.

It is proposed to make recommendations and orders upon the aforesaid and to order the distribution of the balance in the hands of the trustee as follows:

C. B. Watkins, Clerk, Referee's salary & expense fund	$ 481.61
Ray F. Speers, Receiver's fees	316.80

[fol. 9]

Ray F. Speers, Trustee's fees	518.61
Frank Buckingham, Attorney for trustee fee & expenses	739.39
Richard Kruse, Attorney for Bankrupt fee & expenses	405.00
Ray F. Speers, Trustee's expenses	250.00
District Director of Internal Revenue, 53.48% of tax claim	9202.35
Bureau of Unemployment Compensation, 53.48% of tax claim	524.02
Treasurer of Erie County, 53.48% of tax claim	1308.55
Corporate-Franchise Tax Division, 53.48% of tax claim	92.69
Total	$13893.02

Creditors and other parties in interest are required to appear at the above place and time and show cause, if any they have why orders should not be made as above proposed.

NOTICE IS FURTHER GIVEN that a hearing on the trustee's account filed pursuant to the final distribution ordered herein will be held at Room 222, United States Court House in Toledo, Ohio on March 12, 1962 at 10:00 o'clock A. M.

Dated at Toledo, Ohio this 16th day of February, 1962.

FRANK C. KNIFFIN &
T. KENNETH MATTIMORE,
Referees in Bankruptcy.

BEFORE THE REFEREES IN BANKRUPTCY

ANSWER OF THE UNITED STATES TO ORDER TO SHOW CAUSE AND CROSS PETITION.—Filed March 2, 1962

NOW COMES the United States of America by the United States Attorney for the Northern District of Ohio, Western Division, and for answer to the order to show cause denies that the proposed order of distribution is proper and respectfully represents:

[fol. 10] THAT the District Director of Internal Revenue and the United States duly and timely filed its sworn claim for Internal Revenue taxes in this proceeding and said claim specifies the amounts of the statutory tax liens of the United States with the dates thereof;

THAT FURTHER, upon belief and information no objection has been filed in this case by any party as to the merits or amounts of said tax claim and statutory tax liens and no hearing has been held in this case as to the merits or amounts of said tax claims and statutory tax liens;

WHEREFORE, the United States of America prays that the interests of the United States be protected as far as its statutory liens and other rights are concerned.

MERLE M. MCCURDY,
United States Attorney,

By /s/ HARLAND M. BRITZ,
Asst. U. S. Atty.

BEFORE THE REFEREES IN BANKRUPTCY

ORDER OF REFEREE.—June 12, 1962

At Toledo, in this District, on the 12th day of June, 1962.

This matter came on to be heard on the Answer and Cross Petition of the United States of America filed in response to an Order to Show Cause why a proposed order of distribution should not be entered; and upon the evidence.

The responsive pleading alleged that the United States of America has valid liens on the funds in the hands of the trustee and that the proposed order was, therefore, erroneous.

The Court finds that due notice of the hearing was given by mail to all parties in interest.

[fol. 11] At the hearing there appeared on behalf of the United States of America, Buckley Sowards and Harland M. Britz.

The Court finds that the liens of the United States of America are based on three tax assessments made against the bankrupt by the District Director of Internal Revenue on the 3rd day of June 1960; that demands on the bankrupt to pay the assessments was made on the same date but that the assessments were never paid.

The Court finds that the amounts of the liens are as follows:

Under the first assessment, Account No. 60-5-167484: $3555.44 plus $236.98 interest to the date of the assessment.

Under the second assessment, Account No. 60-5-167487: $5312.34 plus $273.48 interest to the date of the assessment.

Under the third assessment, Account No. 60-5-167486: $4602.93 plus $167.91 interest to the date of the assessment.

The Court further finds that notices of the tax liens of the United States of America were not filed in the Office of the Recorder of Erie County, Ohio; the office designated by the State of Ohio for the filing of such notices.

The Court finds that the trustee, herein, had, on the 20th day of June 1960, the status of a judgment creditor of the bankrupt and that the liens of the United States of America are, therefore, invalid as against him.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the objections of the United States of America to the proposed order of distribution be, and they hereby are overruled; that the Answer and Cross Petition of the United States of America be, and it hereby is, dismissed and that the United States of America be, and it hereby is, forever barred from asserting any lien against the funds in the hands of the trustee.

T. KENNETH MATTIMOE,
Referee in Bankruptcy.

[fol. 12]

CC Ray F. Speers, Esq.
Trustee in Bankruptcy
502 Feick Building
Sandusky, Ohio

Frank Buskingham, Esq.
Attorney for Trustee
231 West Washington Row
Sandusky, Ohio.

Harland M. Britz, Esq.
Assistant United States Attorney
U. S. Court House
Toledo, Ohio.

Buckley Sowards, Esq.
Attorney at Law
1620 Williamson Building
215 Euclid Avenue
Cleveland 14, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION.

HEARING ON ANSWER AND CROSS PETITION OF THE UNITED STATES OF AMERICA OF MAY 23, 1962.—Filed June 27, 1962

* * * *

COLLOQUY BETWEEN COURT AND COUNSEL

(2) The Court: The first matter for hearing is the Kurtz Supply Company, No. 27743. As I understand it, the Government filed an Answer and Cross Petition to the proposed order of distribution sent out by the Court.

Mr. Britz: I would like to introduce Your Honor to Buckley D. Sowards, of the Internal Revenue Service, who will be representing the United States of America in this proceeding.

The Court: Do you want to make a statement?

Mr. Sowards: First, we would like to stipulate that the bankruptcy files be made a part of the record, and a statement was made in our Answer to the Cross Petition,

[fol. 13] that we object to the distribution as set forth; and as I understand it, this hearing is being held to ascertain the facts behind our proof of claim, is that not correct?

The Court: I don't know whether your proof of claim would have too much to do with it. Of course, as I understand it, most of these orders with respect to the sale were made prior to the time here; that is, as I (3) understand the situation, there was an order of sale made on the petition of the trustee, and the Director of Internal Revenue or the United States was not made a party to that petition for sale. So that you never had an opportunity to file an answer or assert a lien against the property.

However, a proof of claim was filed, on which there is a date. There is a column which says, "Date Lien Arose," and under that there is a date. That is the only thing I know about the situation.

When the proposed order of distribution was filed and the Government filed its action, I understand the effect of that to be that they are opposing it because they say, "We have a lien on all this money, part of which you are distributing to other taxable authorities"; is that correct?

Mr. Sowards: That is correct.

The Court: So that the matter today would be the proof of whether or not you have a lien.

Mr. Sowards: At this time I would like to move that in the Kurtz case that the exhibits, the Statements of Assessments and the Payments Form be admitted in evidence under Rule 41.

The Court: Have you had them marked?

(4) Mr. Sowards: I have marked them in my own handwriting, your Honor (Handing the said papers to the Court.)

The Court: As a point of information, is this the paper that the Directors gets when the assessment is made? First of all, who makes the assessment?

Mr. Sowards: It is made in the District Director's Office, and this paper is a statement taken from the accounts and the records of the District Director which

[fol. 14] shows the dates the assessment was made, the date that notice and demand was made, and the third part is when the delinquent account is issued.

We are prepared with out witness, your Honor, to elicit testimony as to what is contained in this document.

The Court: But prior to that time could we have an understanding with respect to some of things on these two exhibits—with respect to, for instance, penalty and interest?

Perhaps you are not willing to agree on the interest, but I think you would agree that the penalty cannot be considered part of the lien, is that correct?

Mr. Sowards: We will agree to that.

(5) The Court: The interest you will not ask for?

Mr. Sowards: I do not believe so. Are those admitted in evidence, your Honor?

The Court: I would like to hear testimony on them.

Mr. Sowards: We will call Mr. Gill to the stand, please.

* * * *

(5) Thereupon, the Government called as a witness, ROBERT H. GILL, who, having been previously duly sworn by the Court, testified as follows:

EXAMINATION BY MR. SOWARDS.

Q. Will you state your full name, please? A. Robert H. Gill.

Q. Where are you employed? A. The District Director of Internal Revenue, Cleveland.

Q. What are your duties? A. I am Chief of Special Procedures Section, taking all (6) action on behalf of the District Director in insolvency proceedings.

Mr. Sowards: May I have Exhibit 1, your Honor?

Q. (By Mr. Sowards) Mr. Gill, I hand you what has been marked as Exhibit 1 and ask you to identify it. A. It is a Certificate of Assessment & Payments, Form 899, which amounts to a history of the account.

[fol. 15] Q. Was this document prepared at your request and under your supervision? A. It was prepared at our request from the documents contained in the District Director's Office and under his control, yes.

Q. Do you know whether those records are kept in the usual, normal course of business of the Internal Revenue Service? A. Yes.

Q. Is this document signed by the District Director or his duly designated deputy? A. It shows his initials, "R. J. S.," and that is Raymond J. Sylvester, after the Director's name.

Q. Can you testify that those are his initials, that those initials are Mr. Raymond J. Sylvester's? A. Yes, and there is a delegation in the District Director's (7) Office in Cleveland designating and empowering him to sign the Director's name.

Q. Does it bear the seal of the District Director of the Internal Revenue Service? A. Yes, it does.

Q. Very well.

Mr. Sowards: Before going any further on the contents, I am moving at this time that it be admitted into evidence, your Honor.

The Court: It will be admitted, but I would like to ask a few questions to clear up this matter in my own mind.

Mr. Sowards: Yes.

The Court: Under the prior lien statute the assessment which you say now is made by the Director was made by a commissioner, is that correct?

A. Many years ago, yes, sir, that is correct.

The Court: Then you received it, or the Director did receive it, from the commissioner?

A. Yes, that is the old provision, prior to 1954.

The Court: Prior to 1954.

A. Prior to 1954, I believe that's right. Prior to that they were made by the Assistant Director or Acting Director.

[fol. 16] (8) The Court: Or Acting Director?

A. Or Acting Director, yes.

The Court: Now, after the assessment is made by the Director is a demand made from the debtor?

A. Yes, according to Title 26, by mail.

The Court: Very well. That exhibit has been admitted.

Mr. Sowards: Thank you, sir.

Q. (By Mr. Sowards) Mr Gill, would you explain to the Court the contents of what has been admitted as Exhibit 1, and please give the dates of the assessments, the amounts, and the date of notice and demand? A. This assessment was made against Kurtz Roofing Company, Inc., 305-307 West Water Street, Sandusky, Ohio. It was made for Federal Unemployment Tax for the year 1959, calendar year 1959. The account number under which it was assessed is 60-9-80038.

It was received and scheduled for assessment on 9/30/60, and the assessment was made for $470.56 for tax, $117.64 for penalty, and $18.71 interest.

That interest was figured to the schedule date, which gives a total balance on the assessment, showing no payments, (9) of $606.91.

Mr. Britz: I have $609.

A. This totals up correctly, I believe. Yes. It adds up to $606.91. I think that is a typographical error. This is a certified # 899.

It was assessed on September 30, 1960. The first notice was sent to the taxpayer on September 30, 1960. A delinquent account was issued for collection by the Internal Revenue Service on November 4, 1960.

The Court: There is one point that is not clear in my mind. You said that interest was computed from what date?

A. From the due date of the return, which would be—that return is due by—

[fol. 17] The Court: Do you want to see this again?

A. No. It would be due by—let me think.

The Court: I mean the date at which you computed the interest.

A. To the scheduled date of assessment, September 30, 1960. This is the interest from the date it was due.

The Court: On 9/30/60?

A. Yes, sir.

(10) Q. (By Mr. Sowards) I hand you what has been marked Exhibit 2 and ask you to identify it. A. This is a Certificate of Assessments & Payments, Treasury Form No. 899, and amounts, again, to a history of the account as kept by the District Director, Cleveland.

Q. These are the records that are kept in the usual, normal course of business of the Internal Revenue Service? A. That's right.

Q. Does this bear the signature of the District Director or this person designated by him? A. Yes, the initials, "R. J. S.," as I testified in the earlier one. In other words, there is this delegation to Raymond J. Sylvester to sign it.

Q. And do you recognize that signature as being that of "R. J. S."? A. Yes.

Q. Does it bear the seal of the District Director of Internal Revenue? A. Yes, it does.

Mr. Sowards: I move that this document be admitted at this time.

The Court: It may be admitted.

Q. Will you explain to the Court the contents of the document, (11) Exhibit 2? A. This is sealed. May I open it?

Q. Go ahead, Mr. Gill. Now, would you, as in the prior case, state the account number, the date of the assessment, the amount, and the date of notice and demand upon the taxpayer for each of these accounts as shown? A. Well, this document covers one type of taxes withheld, federal taxes. It covers several different periods, all of [fol. 18] which were assessed against The Kurtz Roofing Company, Inc., 305-307 West Water Street, Sandusky, Ohio.

The first assessment is for the period ending 3/31/59. The Account Number is 60-5-167484. This was scheduled for assessment on 6/3/60. Tax was assessed in the amount of $3555.44; penalty was assessed in the amount of $888.86, and interest to the date of assessment is $236.98.

It reflects no payments made against that assessment of $4681.28. It was assessed on 6/30/60, and first notice went to the taxpayer on 6/3/60. It was issued for collection on 7/8/30.

The second one is an assessment for the same type of tax withheld, federal tax, for the period ending 6/30/59. The assessment Account Number is 60-5-167487. It was scheduled for assessment on 6/3/60, and was assessed tax

on the amount (12) of $5312.34; penalty in the amount of $1328.08, and interest in the amount of $273.48. No payments are reflected on the schedule, and left a total balance assessed of $6913.90.

It was assessed on 6/3/60. The first notice was sent to the taxpayer on the same date, and the delinquent account was issued for collection on 7/8/60.

The third assessment was for taxes withheld, federal taxes, for the period ending 9/30/59, Account No. 60-5-167486. It was scheduled for assessment on 6/30/60. I believe that is in error. The tax—

Q. (Interposing) Of your own knowledge, you say it may be a typographical error, an error in typing? A. I believe so, because the assessment date is 6/3/60, and it would show in 23-C. I believe there is a typographical error in that zero. It couldn't have been scheduled after it was assessed.

Q. May I ask the Account Number? A. Account No. 60-5-167486.

Mr. Sowards: On this particular account, your Honor, I would like to have this marked as Respondent's Exhibit 3 (handing same to the Court).

(Thereupon, the said exhibit was so marked and identified as Exhibit 3.)

[fol. 19] (13) The Court: In reciting these various accounts when you say that the first notice was sent to the taxpayer on such and such a date, that is your demand, is that correct?

A. Right.

The Court: That constitutes the demand of the taxpayer to pay this amount of money?

A. Yes.

Q. (By Mr. Sowards) I hand you what has been marked Exhibit 3 and ask that you identify it.

Mr. Sowards: If it please the Court, I am submitting this exhibit in order to clarify the typographical error contained on the Exhibit 2.

The Court: Very well.

A. This is a photostatic copy or some duplication of the Account Form 23-C, or assessment list, on which the assessment was made. It is dated 6/3/60.

Q. It is dated 6/3/60? A. Yes, 23-C is dated 6/3/60. That is the date.

Q. Mr. Gill, is this signed by the District Director or by the person delegated to sign his name or signature? I am speaking now of the certification. A. Yes, the certification. It is Melvin J. (Byrd's) name, (14) District Director, by "R.J.S.," Raymond J. Sylvester.

Q. He is delegated to sign it? A. Yes, he does.

Q. Does it contain the District Director's seal? A. Yes, it does.

Q. Does this photostat of the records contain the same account number which you were referring to on Exhibit 2? A. Well, on the assessment list itself it shows amounts of money for a particular date. This does not show account numbers, nor will it ever show account numbers.

Q. Was it not prepared from records or accounts maintained in the office of the Director? A. It was prepared from records showing that this amount was assessed on 6/3/60, which would have to be listed by amounts assessed.

[fol. 20] Mr. Sowards: I move that this be admitted in evidence to specifically show the date is correct on Exhibit 2.

The Court: It may be admitted.

Q. (By Mr. Sowards) Continue your explanation of the terms used on Exhibit 2. A. It shows the tax assessed for the period ending 9/30/59, and the amount was $4602.93; penalty assessed in the amount of (15) $1150.73, and the interest assessed is in the amount of $167.91. It reflects no payments having been made. The total assessment is $5921.57.

The Court: You have not been stating the interest date to which it is computed. Are they all to the date of the assessment?

A. Yes, sir. The assessment was made on 6/3/60. The first notice was issued on 6/3/60, and the account was issued for collection on 7/18/60. When that is issued for collection it is issued for enforced collection.

The next one is for the taxable period ending 12/31/59, and again it is withheld federal tax. The account number is 60-9-165589, and the schedule date was 9/30/60.

Assessment was made for tax in the amount of $2474.43; penalty in the amount of $618.61, and interest in the amount of $98.38. The interest, again, is to the date of assessment. No payments were received with the return.

The total amount assessed was $3191.42. This assessment was made on 9/30/60. The first notice to the taxpayer was on 9/30/60, and was issued for collection on 11/4/60.

The next one is for the period ending 3/30/60 on withheld federal taxes. Account No. 60-9-165588. It was scheduled for assessment on 9/30/60. Assessment was made for tax in the (16) amount of $535.63; penalty in the amount of $133.91, and the interest is to the date of assessment and in the amount of $13.39. No payments [fol. 21] were received. The total amount assessed is in the amount of $682.93.

This assessment was made on 9/30/60. The first notice to the taxpayer was on 9/30/60, and it was issued for collection on 11/4/60.

Q. Mr. Gill, when you say "first notice to the taxpayer" that means that the Internal Revenue Service has made a demand on the taxpayer to pay these accounts? A. That is correct. I believe demand is set up in the Internal Revenue Code.

Mr. Sowards: Do you have any further questions of this witness, your Honor?

The Court: Yes. May I see the exhibit?

(Thereupon, Mr. Gill, the witness, handed the said exhibit to the Court.)

The Court: Will you look at the two accounts on the second page of Exhibit 2? Both of those assessment dates are September 30, 1960, is that correct?

A. Yes, sir.

(17) The Court: Does the Government take the position that the Government had liens with respect to those assessments when the adjudication of bankruptcy took place on June 20, 1960, Mr. Sowards, as to those two particular accounts?

Mr. Sowards: After the date of bankruptcy we do not have; we have secured liens.

The Court: That is, on those two accounts?

Mr. Sowards: Yes. That would be Account No. 60-9-165589 and Account No. 60-9-165588.

The Court: In other words, you are not claiming any liens with respect to those two accounts?

Mr. Sowards: Not with respect to those two accounts.

I have no further questions of the witness, your Honor.

The Court: I have no further questions. Do you have anything else to say, Mr Sowards?

[fol. 22] COLLOQUY OF COURT AND COUNSEL

Mr. Sowards: No, your Honor. When we filed our Answer and Cross Petition we filed a Memorandum Brief, and if the Court so desires we will (18) happy to file a supplemental brief.

The Court: I believe you both know what the issue is.

Mr. Sowards: We like to say there are two issues.

The Court: What do you now say they are?

Mr. Sowards: Well, (a) whether the trustee in bankruptcy falls within one of the four excepted classes as set forth in Section 6223, Internal Revenue Code of 1954; and (b) whether or not a lien arising under Section 6321 of the Internal Revenue Code of 1954 is entitled to priority under the Bankruptcy Code as a secured lien.

The Court: I may be oversimplifying the matter, but it seems to me that it still looks to me like you have one question, your (a) classification.

Mr. Sowards: We think they are interrelated.

The Court: They probably are. Maybe I am oversimplyifying it. The issue, as I see it, is that the Government would have a lien except for the (19) trustee's position that he has a judgment creditor under the classification you recited as your (a).

Mr. Sowards: Yes, your Honor.

The Court: Are you resting? Is that all?

Mr. Sowards: Yes.

* * * *

[fol. 23]

EXHIBIT 1.

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

NAME OF TAXPAYER	ADDRESS (Number, street, city, and State)	CLASS OF TAX	DATE OF REQUEST
Kurtz Roofing Co., Inc.	305-307 W. Water St., Sandusky, Ohio	FUTA	2-26-62

Taxable Period (a)	Account Number (b)	Received or Scheduled Date (c)	Description (d)	Liability and (Abatement) (e)	Payments and Credits Applied (f)	Balance (g)	Refunds and Credits Allowed (h)	Supplemental Information (i)
1959	60-9-880038	9-30-60	Tax	470.56				Assessed 9-30-60
			Penalty	117.64				First Notice 9-30-60
			Interest	18.71		609.91		Second Notice
								Delinquent Account
								Issued 10-14-60
								Lien Filed
								Assessed
								First Notice
								Second Notice
								Delinquent Account
								Issued
								Lien Filed
								Assessed
								First Notice
								Second Notice
								Delinquent Account
								Issued
								Lien Filed

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as shown therein.

SIGNATURE OF DISTRICT DIRECTOR	LOCATION	DATE
/s/ MELVIN J. BURTON	Cleveland, Ohio	3-7-62-JW: cr

Over

FORM 899 (Rev. 7-58)

EXHIBIT 2.

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

NAME OF TAXPAYER	ADDRESS (Number, street, city, and State)	CLASS OF TAX	DATE OF REQUEST
Kurtz Roofing Co., Inc.	305-307 W. Water St., Sandusky, Ohio	WFT	2-26-62

Taxable Period (a)	Account Number (b)	Received or Scheduled Date (c)	Description (d)	Liability and (Abatement) (e)	Payments and Credits Applied (f)	Balance (g)	Refunds and Credits Allowed (h)	Supplemental Information (i)
3-31-59	60-5-167484	6-30-60	Tax Penalty Interest	3,555.44 888.86 236.98		4,681.28		Assessed 6-30-60 First Notice 6-31-60 Second Notice Delinquent Account Issued 8-5-60 Lien Filed
3-31-59	60-ME-130775	7-22-60	Penalty (DR)	59.25		59.25		Assessed 7-22-60 First Notice 7-22-60 Second Notice Delinquent Account Issued 8-26-60 Lien Filed
6-30-59	60-5-167487	6-3-60	Tax Penalty Interest	5,312.34 1,328.08 273.48		6,913.90		Assessed 6-3-60 First Notice 6-31-60 Second Notice Delinquent Account Issued 8-5-60 Lien Filed

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as shown therein.

SIGNATURE OF DISTRICT DIRECTOR	LOCATION	DATE
/s/ MELVIN J. BURTON	Cleveland, Ohio	3-7-62-JW: cr

Over

FORM 899 (Rev. 7-58)

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

NAME OF TAXPAYER	ADDRESS *(Number, street, city, and State)*	CLASS OF TAX	DATE OF REQUEST
Kurtz Roofing Co., Inc.	305-307 W. Water St., Sandusky, Ohio	WFT	2-26-62

Taxable Period *(a)*	Account Number *(b)*	Received or Scheduled Date *(c)*	Description *(d)*	Liability and (Abatement) *(e)*	Payments and Credits Applied *(f)*	Balance *(g)*	Refunds and Credits Allowed *(h)*	Supplemental Information *(i)*
6-30-59	60-ME-130776	7-22-60	Penalty (DR)	88.53		88.53		Assessed 7-22-60 First Notice 7-22-60 Second Notice Delinquent Account Issued 8-26-60 Lien Filed
9-30-59	60-5-167486	6-3-60	Tax Penalty Interest	4,602.93 1,150.73 167.91		5,921.57		Assessed 6-30-60 First Notice 6-30-60 Second Notice Delinquent Account Issued 8-5-60 Lien Filed
9-30-59	60-ME-130777	7-22-60	Penalty (DR)	76.70		76.70		Assessed 7-22-60 First Notice 7-22-60 Second Notice Delinquent Account Issued 8-26-60 Lien Filed

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as shown therein.

SIGNATURE OF DISTRICT DIRECTOR	LOCATION	DATE
/s/ MELVIN J. BURTON	Cleveland, Ohio	3-7-62-JW: cr

Over

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

NAME OF TAXPAYER	ADDRESS (Number, street, city, and State)	CLASS OF TAX	DATE OF REQUEST
Kurtz Roofing Co., Inc.	305 W. Water St., Sandusky, Ohio	WFT	2-26-62

Taxable Period (a)	Account Number (b)	Received or Scheduled Date (c)	Description (d)	Liability and (Abatement) (e)	Payments and Credits Applied (f)	Balance (g)	Refunds and Credits Allowed (h)	Supplemental Information (i)
12-31-59	60-9-165589	9-30-60	Tax Penalty Interest	2,474.43 618.61 98.38		3,191.42		Assessed 9-30-60 First Notice 9-30-60 Second Notice Delinquent Account Issued 10-14-60 Lien Filed
12-31-59	60-11-290053	11-30-60	Penalty (DR)	41.23		41.23		Assessed 11-30-60 First Notice 11-30-60 Second Notice Delinquent Account Issued 1-6-61 Lien Filed
3-31-60	60-9-165588	9-30-60	Tax Penalty Interest	535.63 133.91 13.39		682.93		Assessed 9-30-60 First Notice 9-30-60 Second Notice Delinquent Account Issued 10-14-60 Lien Filed

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, payments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as shown therein.

SIGNATURE OF DISTRICT DIRECTOR	LOCATION	DATE
/s/ MELVIN J. BURTON	Cleveland, Ohio	3-7-62-JW: cr

Over

[fol. 27]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

PETITION FOR REVIEW.—Filed June 20, 1962

To T. Kenneth Mattimoe, Esq., Referee in Bankruptcy:

The petition of the United States of America respectfully represents:

1. Your petitioner is aggrieved by the order herein of T. Kenneth Mattimoe, Referee in Bankruptcy, dated June 12, 1962, a copy of which order is annexed hereto, marked Exhibit A, and made a part hereof.

2. The referee erred in respect to said order in failing to find that the District Director of Internal Revenue and the United States duly and timely filed its sworn claim for Internal Revenue taxes in this proceeding and that said claim for Internal Revenue taxes in this proceeding and that said claim specifies the amounts of the statutory tax liens of the United States with the dates thereof, all as shown by the files and records of the referee in this proceeding.

3. The referee erred in respect to said order in its sixth paragraph in failing to find as fact that the amounts of the liens include additional statutory 6% interest upon the amounts of tax assessed from the date of the tax assessments on June 3, 1960 to June 20, 1960, the date on which the petition in bankruptcy in this case was filed.

4. The referee erred in respect to said order in its eighth paragraph in concluding as a matter of law that the "trustee, herein, had, on the 20th day of June 1960, the status of a judgment creditor of the bankrupt and that the liens of the United States of America are therefore invalid as against him."

5. The referee erred in respect to said order as a matter of law in overruling the objections of the United States of America to the proposed order of distribution.

6. The referee erred in respect to said order as a matter of law in dismissing the Answer and Cross Petition herein of the United States of America.

[fol. 28] 7. The referee erred in respect to said order as a matter of law in barring the United States from asserting any lien against the funds in the hands of the trustee.

WHEREFORE your petitioner prays that said order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, that said order be reversed, and that the interest of the United States be protected as far as its statutory liens and other rights are concerned, and that your petitioner have such other and further relief as is just.

For the Petitioner:

MERLE M. MCCURDY,
United States Attorney,

by HARLAND M. BRITZ,
Assistant United States Attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DISTRICT

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW.—Filed December 11, 1962

To: Honorable Frank L. Kloeb, Judge, United States District Court, Northern District of Ohio, Western Division:

I, T. Kenneth Mattimoe, Referee in Bankruptcy, in charge of the above proceeding, do hereby certify:

The Kurtz Roofing Company is an Ohio corporation which had its principal place of business in Sandusky, Ohio. After bankruptcy, all of the personal property of the corporation was sold and all assets were reduced to cash. The property sold consisted of motor vehicles, roofing materials on hand, machinery and other similar equipment and materials. The last orders confirming sale were entered on February 14, 1962.

Shortly thereafter, notice was given to all creditors of the final meeting of creditors. This meeting was set for [fol. 29] March 5, 1962. Included in the notice was a summary of the administration of the bankrupt's estate and a proposal with respect to the distribution of the assets totaling $13,893.02. The proposed disposition provided for payment of a dividend amounting to 53.48% on all tax claims. They were to be treated as priority claims. $9,202.35 was proposed to be paid to the District Director of Internal Revenue.

Before the date of the final hearing, on March 2, 1962, an answer was filed on behalf of the United States and the District Director of Internal Revenue asserting statutory tax liens in indefinite amounts and praying that the interests of the United States be protected insofar as its statutory liens and other rights are concerned.

After notice was given, a hearing on the allegations of this answer was held on May 2, 1962. Subsequently, on June 12, 1962, an order was entered denying the claim of statutory tax lien asserted by the District Director of Internal Revenue and the United States.

It is from this order that a petition for review was filed on June 20, 1962.

THE EVIDENCE.

At the hearing on May 2, 1962, the United States claimed liens based upon Federal Withholding Income Tax due from the bankrupt but not paid as follows:

Period	Tax
March 31, 1959 Withholding Tax	$3,555.44
June 30, 1959 Withholding Tax	5,312.34
September 30, 1959 Withholding Tax	4,602.93

The evidence submitted by the United States as to these items (Accounts No. 60-5-167484, 60-5-167487 and 60-5-167486 in Exhibits 1 and 2) showed that assessments of these taxes with interest to the date of the as-

[fol. 30] sessment were made by the District Director of Internal Revenue on June 3, 1960, and that demand for payment was made on bankrupt by mail the same day.

Evidence was adduced, also, as to other tax items, assessments of which were made after June 20, 1960, the date of the bankruptcy. These are Accounts No. 60-9-880038, 60-9-165589 and 60-9-165588 in Exhibits 1 and 2.

The evidence is undisputed that, although the taxes for which statutory tax liens are claimed were "assessed" before bankruptcy, no notice was filed with the Recorder of Erie County, the County in which the bankrupt's property was located, prior to bankruptcy.

THE ISSUES PRESENTED.

By statute, Congress has made a Trustee in Bankruptcy a "lien creditor" for the purpose of determining priority of claims to the bankrupt's property, and this has always been interpreted to include a grant of the rights of a judgment lien creditor to the Trustee in Bankruptcy. Bankruptcy Act, Sec. 70c, 11 U. S. C. Sec. 110(c).

By other statutes, Congress has given the United States a statutory tax lien against the property of a taxpayer which arises on the date the assessment of such tax is made. An exception to this statute is that such a lien shall not be valid against a "judgment creditor" unless notice is filed in an office designated by state law or with the Clerk of the District Court. 26 U. S. C. Secs. 6321, 6323.

By statute, the Recorder of the county in which the bankrupt had its principle place of business is the office designated by the State of Ohio for the filing of the notices of lien. Sec. 317.09 O. R. C. There is no evidence nor claim that notice was filed with the appropriate County Recorder nor with the Clerk of the District Court.

Stated affirmatively, the single issue presented is:

Considering (1) the traditional position of a Trustee in Bankruptcy as a "universal judgment lien creditor," [fol. 31] (2) the all-inclusive terminology of the Bankruptcy Act which establishes a Trustee as a creditor holding a lien by legal or equitable proceedings [Bankruptcy

Act Sec. 70c, 11 U. S. C. Sec. 110(c)] and (3) the legislative history of the two Congressional enactments under consideration (Bankruptcy Act Sec. 70c, 11 U. S. C. Sec. 110(c) and 26 U. S. C. Secs. 6321 and 6323), the Trustee in Bankruptcy is a judgment creditor and the tax lien claimed is not "valid * * * as against" him by reason of the statutory exception created by 26 U. S. C. Sec. 6323.

Findings of Fact.

1. On June 20, 1960, Kurtz Roofing Company filed its voluntary petition in bankruptcy with this Court. It is an Ohio corporation and, prior to bankruptcy, was engaged in business with its principal office and place of business in Sankusky, Erie County, Ohio.

2. Thereafter on July 20, 1960, Ray F. Spears was appointed Trustee in Bankruptcy for the bankrupt and he is now acting in that capacity.

3. All of the property with respect to which the United States claims and has claimed a lien for federal taxes was personal property. At all times pertinent to this proceeding, it has been situated in Erie County, Ohio. It was in the possession and control of the bankrupt prior to June 20, 1960 and, until sold, it was in the possession and control of this Court and its Trustee in Bankruptcy after that date.

4. The property involved in this proceeding which is claimed to be subject to federal statutory tax lien, was not at any time taken into the possession of the United States.

5. As of June 20, 1960, the Trustee in Bankruptcy herein became, as to all property subject to this proceeding, a statutory judgment lien creditor with all the rights, remedies and powers which could arise from a legal lien on all of such property, including the rights of a judgment creditor under 26 U.S.C. Sec. 6323.

[fol. 32] 6. On September 30, 1960, the District Director of Internal Revenue assessed certain taxes with interest to the date of the assessment and made demand on the bankrupt for their payment on the same date. Since the date of the assessment and demand for payment of these taxes was subsequent to June 20, 1960, the date of

bankruptcy, the interest and rights of the Trustee are prior to any liens of the United States for these taxes. They are:

Account Number	Tax	Amount
60-9-880038	Federal Unemployment	$ 470.56
	Interest to 9-30-60	18.71
60-9-165588	Withholding Tax	535.63
	Interest to 9-30-60	13.39
60-9-165589	Withholding Tax	2,474.43
	Interest to 9-30-60	98.30

7. On all of the accounts on which the United States claims liens there are included certain items as penalties. Even if all of the liens were valid, penalties included in such liens cannot be allowed. The amounts of these penalties are:

Account Number	Amount
60-5-167484	$ 888.86
60-5-167486	1,150.73
60-5-167487	1,328.08
60-9-165589	618.61
60-9-165588	133.91
60-9-880038	117.64
Total	$4,237.83

8. On June 3, 1960, the District Director of Internal Revenue assessed certain taxes with interest to the date of the assessment and made demand on the bankrupt for their payment on the same date. However, no notice of federal tax liens for internal revenue taxes was at any time filed in the office of the Recorder of Erie County, [fol. 33] Ohio, nor the office of the Clerk of Court for this Judicial District. These are, respectively, the county and United States Judicial District in which the property claimed to be subject to the lien was situated. Such items of taxes and interest are:

Account Number	Tax	Amount
60-5-167484	Withholding Tax	$3,555.44
	Interest to 6/30/60	236.98
60-5-167486	Withholding Tax	4,602.93
	Interest to 6/30/60	167.91
60-5-167487	Withholding Tax	5,312.34
	Interest to 6/3/60	273.48
	Total	$14,149.08

9. The statutory tax liens of the United States for the taxes and interest described in Finding Number 8 above are not valid as against the Trustee in Bankruptcy, because he is a judgment lien creditor.

10. Section 47a (2) of the Bankruptcy Act, which was enacted and became effective in 1910, recognized a Trustee in Bankruptcy as "a judgment creditor holding an execution duly returned unsatisfied" or with respect to property in the custody of the Bankruptcy Court as having "all the rights, remedies, and powers of a creditor holding a lien by equitable or legal proceedings thereon." By amendments to the Bankruptcy Act enacted in 1938 and 1950, the United States Congress intended to continue Trustees in Bankruptcy in their traditional status of a judgment lien creditor with the same rights and priorities as any conventional judgment creditor.

11. Prior to 1913, the statutory tax lien (now codified in 26 U. S. C. Sec. 6321) was valid as to all others without filing or recording. In that year, the United States Congress amended the Revenue Code to provide that such lien should be invalid as to judgment creditors unless notice was filed. This amendment was enacted and became effective after the now traditional status of a Trus- [fol. 34] tee in Bankruptcy as a judgment lien creditor had become the law of the United States by the enactment of Section 47a(2) of the Bankruptcy Act.

Conclusions of Law.

1. For the purpose of determining the priority of liens and interest in property of a bankrupt and by statutory

enactment, United States Congress granted to Trustees in Bankruptcy the status of a creditor holding a lien obtained by legal proceedings. This status is greater than and includes that of a judgment creditor of the bankrupt holding a judgment lien against its property.

2. For the purpose of creating and determining the priority of liens to secure the collection of federal taxes and by statutory enactment, United States Congress has provided that federal tax liens can be created by assessment and demand for payment, but that such liens shall not be valid as against a mortgagee, pledgee, purchaser or judgment creditor until notice of the lien has been filed with the County Recorder or Clerk of th United States District Court for the county or district, spectively, in which the property subject of the lien is situated.

3. The legislative purpose of Section 70c of the Bankruptcy Act, 11 U. S. C. Section 110(c), is to preserve for the Trustee in Bankruptcy and the general creditors of the bankrupt all property not subject to a lien supported by public notice existing on the date of the adjudication in bankruptcy.

4. The legislative purpose of 26 U. S. C. Section 6323 (a) is to protect and preserve the priority of liens of judgment lien creditors over federal tax liens of which no public notice is given. A Trustee in Bankruptcy is a judgment creditor within the meaning of this statute.

5. Because the assessments and demands for payment were made subsequent to bankruptcy with respect to the taxes claimed in Accounts No. 60 9 830038, 60 9 165588 and 60 9 165589, the federal tax liens claimed for those accounts are invalid as against the Trustee in Bankruptcy.

[fol. 35] 6. Inasmuch as no notice of federal tax lien was filed prior to bankruptcy with respect to the taxes claimed in Accounts No. 60 5 167484, 60 5 167486 and 60 5 167487, the federal tax lien claims for those accounts are invalid as to the Trustee in Bankruptcy.

7. The claim of the United States for penalties must, as a matter of law, be disallowed.

MEMORANDUM.

The facts in this proceeding are not in dispute. In the case of three tax accounts, neither the assessment nor the demand was made until more than 90 days after the adjudication in bankruptcy. No claim of lien is advanced as to these accounts.

With respect to all penalties, the United States agrees that they cannot be allowed. (R. 4) *Simonson vs. Granquist*, 369 U.S. 38, 40 (1962).

In the case of three other tax accounts for federal withholding tax, the assessment and demand for payment were made on June 3, 1960. This was 17 days before bankruptcy on June 20, 1960. However, no notice of tax lien was filed (at any time) with the County Recorder or the Clerk of the United States District Court in the county or district, respectively, where the property was situated.

United States claims that its statutory tax liens were perfected by reason of the assessment and demand made on June 3, 1960 and the subsequent failure of the bankrupt to make payment even though no notice was filed.

The Trustee contends that any such lien is invalid as to him by reason of the provisions of the Internal Revenue Code, 26 U.S.C. Sec. 6323, and of the Bankruptcy Act, Sec. 70c, 11 U.S.C. Sec. 70(c). The Revenue Code provides that statutory tax liens are not valid against judgment creditors unless notice is appropriately filed, and Section 70c, he asserts, is a Congressional enactment that he shall be a judgment lien creditor in adjudging rights in the bankruptcy property.

[fol. 36] Your Referee has accepted as correct the contention of the Trustee in Bankruptcy that he is a judgment creditor and that any tax lien is invalid as to him.

The superiority of a Trustee's right to bankrupts' property over claims of secret liens was established by Congressional enactment after years of controversy and litigation. Prior to the year 1910, Section 70a of the Bankruptcy Act provided that "the Trustee * * * shall * * * be vested * * * with the title of the bankrupt * * * to all * * * (5) property * * * which might have been levied upon and sold under judicial process against him

* * *." Despite this broad language, it was held that an unrecorded conditional sale contract was superior in right to the statutory title of the Trustee. *York Manufacturing Co. vs. Cassell*, 201 U.S. 344, 352 (1906); *Security Warehousing Co. vs. Hand*, 206 U.S. 415, 425 (1907). One of the reasons for such holding as stated in the latter case (p. 425) was "because * * * the adjudication (in bankruptcy) did not operate as the equivalent of a judgment or attachment or other specific lien on the property."

In 1910, Congress undertook specifically to remedy this situation by the enactment of Section 47a(2) of the Bankruptcy Act. This amendment was aimed directly at "the evil of secret liens." It had two distinct ideas. As stated in 45 *Cong. Record* 2277 (1910), these were said to be:

> "First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; and, second, that as to property not in the custody of the bankruptcy court, the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an *individual creditor* might have done to subject assets." (Emphasis added.)

[fol. 37] The amendment, Section 47a(2) of the Bankruptcy Act, was in full compliance with this statement from the floor of Congress. And the Trustee in Bankruptcy was given the status of judgment creditor in all situations where it was necessary to determine the priority of the rights of the Bankruptcy Court and its Trustee with regard to unrecorded liens.

This section continued in substantially the same form until its amendment in 1950. At that time, and as to all property "whether or not coming into possession or control of the court" the Trustee was given the status of "a creditor then holding a lien * * * by legal or equitable proceedings." Sec. 70c of the Bankruptcy Act, 11 U.S.C.

Sec. 110(c). This provision, as well as the discussions, reports and considerations with respect to it, make clear that the latter clause includes within its meaning a creditor holding a judgment lien and thus a "judgment creditor." Senate Report No. 72, House Report No. 1293 (S. 88), U.S. Code Cong. Serv., 81st Cong., 2nd Sess. (1950) 1985, 1986; 96 *Cong. Record* 1529, 1532 (1950); *Hearing Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives*, 81st Cong., 1st Sess. on H. R. 272 and H. R. 2691, March 14, 16 and 18, 1949, Serial No. 7, pp. 8, 11-12, 49, 61, 138; *Hearings Before Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary, House of Representatives*, 80th Cong., 2nd Sess., H. R. 2412 and H. R. 5834, May 7, 1948, Serial No. 19, pp. 9, 10, 14, 17, 47, 49, 63, 65, 148.

Senate Report No. 72 (House Report No. 1293), *supra*, makes the judgment lien creditor status of the Trustee in Bankruptcy clear with these words at pages 1985-1986:

> "(b) Section 2 of the bill amends section 70c of the bankruptcy Act, dealing with the general rights of a trustee in bankruptcy, and is essentially correlative to the amendment to section 60a, effected by section 1 of the bill. Under existing law, a trustee as to all property in the possession or under the control of the bankrupt, at the date of bankruptcy, is deemed [fol. 38] vested, as of the date of bankruptcy, with all of the rights of a creditor then holding a lien by legal or equitable proceedings, and, as to all other property, with the rights of a judgment creditor then holding an unsatisfied execution.
>
> "In view of the amendment made to section 60a, as well as intrinsically, it is deemed wise to place the trustee in bankruptcy in the position of a lien creditor with respect to all of the bankrupt's property, and section 2 of the bill so amends section 70c.
>
> "II. STATEMENT.
>
> "Traditionally, it is the primary office of the Bankruptcy Act to protect creditors, both secured and

unsecured; to marshal the bankrupt's assets; and to distribute them among his creditors equitably and ratably, in accordance with their respective rights and interests.

"It follows from these broad general principles, as well as from the basic provisions of the Bankruptcy Act itself that—

"(A) A trustee in bankruptcy occupies the position of a 'universal' judgment or lien creditor, with all such a creditor's remedies (Bankruptcy Act, sec. 70); * * *"

Subcommittee Chairman Hobbs further confirmed this on the floor of the House of Representatives stating:

"All that a trustee needs is a judgment from a court of competent jurisdiction giving him his lien as a preference * * * and that is what this bill does." (96 Cong. Record 1532, *supra.*)

Congress thereafter enacted an amendment to Section 70c of the Bankruptcy Act, 11 U.S.C. Section 110(c) providing that as of the date of bankruptcy, the Trustee "shall be deemed vested as of such date with all the rights, remedies and powers of a creditor then holding a lien" on the property of the bankrupt obtained by legal or equita- [fol. 39] ble proceedings. Thereby establishing the Trustee as a judgment lien creditor.

Over the same period of time, the federal statutory tax lien based upon 26 U.S.C. Section 6321 and its predecessor section was progressing from a strict interpretation which permitted no exceptions to the present position which recognizes identified statutory exceptions. *United States vs. Snyder*, 149 U.S. 210, 214 (1893); 26 U.S.C. Sec. 6322.

It was the court's holding in the case of *United States vs. Snyder, supra*, that the federal statutory tax lien was valid *without recording* even against a bona fide purchaser which brought about the amendment that is now 26 U.S.C. Section 6323. The section, of course, provides that no federal tax lien under Section 6321 "shall be valid as against any mortgagee, pledgee, purchaser or judgment

creditor until notice thereof has been filed" as required by state law or with the Clerk of the United States District Court in the district where the property is located. This amendment was adopted in 1913, three years after Congress had established Trustees in Bankruptcy as judgment lien creditors. 37 Stat. 1016 (1913). "Effect of Federal Tax Lien on Ohio Real Property," Charles R. Leach, Jr., 16 Ohio St. L. J. 92-108 (1955).

Each of these amendments was remedial in nature and is therefore to be given a liberal construction to attain the end intended by Congress. *Seasongood vs. C. I. R.*, 227 F. 2d 907 (6 Cir. 1955).

Also applicable are the guiding principles of statutory construction that tax statutes should be construed in favor of the taxpayer, *Delaney, et al. vs. Denver*, 185 F. 2d 246, 253 (10 Cir. 1950), and that statutes which are related must be construed together, *Offutt Housing Co. vs. County of Sarpy*, 351 U.S. 253, [illegible] (1956); *Allen, etc. vs. Grand Central Aircraft Co.*, 347 U.S. 535, 541 (1954).

The Supreme Court has stated its thought that "in Section 3672 (26 U.S.C.A. Sec. 6321) Congress used the words 'judgment creditor' in the usual, conventional [fol. 40] sense of a judgment of a court of record," since all states have such courts. *United States vs. Gilbert Associates, Inc.*, 345 U.S. 361 (1953). The legislative history referred to above and the judicial decisions discussed below indicate that Congress expected a Trustee in Bankruptcy to have just this status. *Meyers, Trustee vs. Matley*, 318 U.S. 622, 627 (1943); *In re Toms*, 101 F. 2d 617, 619 (6 Cir. 1939). In accord with these two controlling decisions are the following decisions. *Jackson vs. Menick*, 260 F. 2d 563, 564 (9 Cir. 1958); *B. F. Avery & Sons Co. vs. Davis*, 226 F. 2d 942, 945 (5 Cir. 1955); *Sampsell vs. Straub*, 194 F. 2d 228, 231 (9 Cir. 1951); cert. denied 343 U.S. 927 (earlier opinion 189 F. 2d 379, 381-382); *In re Lustron Corp.*, 184 F. 2d 789, 793 (7 Cir. 1950); cert. denied 340 U.S. 946; *Georgia Association etc. vs. Allen*, 112 F. 2d 52, 56 (5 Cir. 1940); *In re Cobb*, 14 F. Supp. 465, 466-467 (D.C. E.D. Mich. 1936).

Still other cases unequivocally acknowledge that a Trustee in Bankruptcy, as of the date of bankruptcy, has

been endowed with rights which by recognition of common legal meaning make him a judgment lien creditor. *Brookhaven Bank & Trust Co. vs. Gwin*, 253 F. 2d 17, 23 (5 Cir. 1958); *In re Ripp*, 242 F. 2d 849, 852 (7 Cir. 1957); *Salkind vs. Dubois*, 105 F. 2d 640 (3 Cir. 1937).

In the light of the statute and related authorities, the Referee is bound to follow the principles laid down in the Supreme Court decision in *Meyers vs. Matley, supra.* At page 627 the court undeniably held that a Trustee in Bankruptcy is a judgment creditor. It used these words:

> "Historically, and under the theory of the present Act, bankruptcy has the force and effect of the levy of equitable distribution amongst them of the bankrupt's assets. The trustee is vested not only with the title of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody."

The Court of Appeals for the Sixth Circuit stated the same holding in the case of *In re Toms, supra*, at page 619 of its opinion it said:

[fol. 41] "Under Section 47a as amended, 11 U.S.C.A. § 75(a) in determining conflict of title between the trustee and third parties, he does not stand in place of the bankrupt, but his rights are to be determined as though he were a creditor holding a lien by legal or equitable proceedings at the time the petition is filed, if the property is in the possession of the bankrupt or trustee. If unpossessed, the rights and remedies of the trustee shall be determined as though he were a judgment creditor holding an execution duly returned unsatisfied * * *."

The dictum of Judge Allen in *In re Taylorcraft Aviation Corp.*, 168 F. 2d 808, 810 (6 Cir. 1948), cannot alter this conclusion. It was a statement beyond the issues of the case and did not overrule the case of *In re Toms, supra.* See *United States vs. Sands*, 174 F. 2d 384, 385 (2 Cir. 1949).

Recent decisions have refused to accept the clear Congressional mandate creating judgment lien creditor status

for a Trustee in Bankruptcy. *Simonson vs. Granquist*, 287 F. 2d 489 (9 Cir. 1961); *In re Fidelity Tube Corp.*, 278 F. 2d 776 (3 Cir. 1959); cert. denied 364 U.S. 828. The erroneous reasoning of these cases is made clear in the dissenting opinion of Judge Kalodner in the latter case.

However, regardless of the interpretations of the appellate courts, the controlling authorities are the statutes, 26 U.S.C. Secs. 6321-6323 and 11 U.S.C. Sec. 110 (c), and their scope and purposes are made clear by their legislative history and the decision of the United States Supreme Court in the case of *Meyers v. Matley, supra.* The Referee has no choice but to accept and follow this law. The Trustee in Bankruptcy in this case is a judgment creditor within the meaning of 26 U.S.C. Section 6323 and the statutory tax liens are invalid as to him because no notice of such liens was filed in accordance with law.

Herewith I hand up for consideration of your Honor the following documents which are part of this Certificate:

[fol. 42]

Number	*Document*	*Filed*
		1960
1	Petition in bankruptcy	June 20
2	Order appointing Trustee in Bankruptcy	July 20
		1962
3	Notice of final meeting of creditors	February 16
4	Answer of United States	March 2
5	Order denying United States' claim of statutory tax lien	June 12
6	Transcript of hearing of May 23, 1962 together with exhibits	June 27
7	Petition for review of order of June 12, 1962	June 20

T. KENNETH MATTIMOE,
Referee in Bankruptcy.

CC: Ray F. Spears, Esquire
502 Feick Building, Sandusky, Ohio

Frank Buckingham, Esquire
231 W. Washington Row, Sandusky, Ohio

Robert B. Gosline, Esquire
Shumaker, Loop & Kendrick
811 Madison Avenue, Toledo 2, Ohio

Harland M. Britz, Esquire
Assistant United States Attorney
U. S. Court House, Toledo, Ohio

Buckley D. Sowarts, Esquire
Internal Revenue Service
1630 Williamson Building
215 Euclid Avenue, Cleveland 14, Ohio

District Director of Internal Revenue
P. O. Box 6902, Cleveland, Ohio

[fol. 43]

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Western Division

ORDER DISMISSING PETITION FOR REVIEW, ETC.—March 20, 1963.

At Toledo, in said district, this 20th day of March, 1963.

This day the matter of the Petition of the United States of America for Review of the Referee's Order, entered herein on June 12, 1962, overruling the objections of the United States of America to the proposed Order of Distribution, dismissing the answer and cross petition of the United States of America and forever barring the United States of America from asserting any lien against the funds in the hands of the Trustee, came on to be considered upon the Certificate of the Referee and the documents attached thereto, including the transcript of testimony and evidence, the exhibits offered and received in evidence on hearing before the Referee, the Petitions for Review and the briefs of counsel.

The Court, being fully advised in the premises, finds that the Findings and Conclusions of the Referee set out in his Certificate are correct and should be confirmed and adopted as the Findings and Conclusions of the Court, and that the Order described herein is well taken and should be confirmed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Petition for Review described herein be, and the same hereby is, dismissed; that the Findings and Conclusions of the Referee set out in his Certificate be, and the same are hereby confirmed and adopted as the Findings and Conclusions of the Court; and that the Order of the Referee described herein be, and the same hereby is approved and confirmed.

/s/ Frank L. Kloeb,
United States District Judge.

[fol. 44]

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio,
Western Division

NOTICE OF APPEAL.—Filed April 17, 1963.

Notice is hereby given that the United States of America, a creditor in the above-captioned bankruptcy, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the order of this Court entered on March 20, 1963, dismissing the Petition for Review filed by the said United States of America and approving and confirming the Findings, Conclusions, and Order of the Referee in Bankruptcy.

MERLE M. MCCURDY,
United States Attorney,

HARLAND M. BRITZ,
Assistant United States Attorney.

[fol. 45]

[MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
February 6, 1964 (Omitted in printing)]

[fol. 47]

[File Endorsement Omitted]

No. 15405

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In the Matter of

THE KURTZ ROOFING COMPANY,
d/b/a KURTZ SUPPLY COMPANY,
Bankrupt,

UNITED STATES OF AMERICA, APPELLANT

v.

RAY F. SPEERS, Trustee in Bankruptcy, APPELLEE

Appeal from the United States District Court
for the Northern District of Ohio

OPINION—Decided August 4, 1964.

Before: CECIL and O'SULLIVAN, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. Section 6323(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 6323(a), protects a "judgment creditor" against unfiled federal tax liens. This appeal requires us to decide whether Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c), confers upon a trustee in bankruptcy the right of a judgment creditor to resist imposition on the bankrupt's assets of a federal tax lien not filed prior to bankruptcy. The referee in bankruptcy and the District Judge held that the trustee had such right, and treated the government on a par with other priority claimants, as provided in Section 64(a) of the Bankruptcy Act, 11 U.S.C. § 104(a). We agree with

this ruling. Under it, the government will receive 53.48% of $14,149.08, the amount for which it asserts a lien. [fol. 48] The government taxes here involved were assessed against Kurtz Supply Company on June 3, 1960. That company was adjudicated a bankrupt on June 20, 1960. Under Sections 6321 and 6322 of Int. Rev. Code of 1954, 26 U.S.C. §§ 6321, 6322, the asserted federal tax lien was perfected as of the date of assessment and demand, June 3, 1960. Section 6323(a) of the Code, however, provides that:

> ". . . the lien imposed by section 6321 *shall not be valid* as against any mortgagee, pledgee, purchaser, or *judgment creditor* until notice thereof has been filed by the Secretary or his delegate . . . ." (Emphasis supplied.)

No such notice was filed in this case prior to bankruptcy.

Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110 (c), provides in pertinent part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The question before us, then, is whether the words "a creditor then holding a lien" upon the bankrupt's assets "by legal . . . proceedings" describe, among others, a judgment creditor. If so, the bankruptcy trustee, under 70(c), has all the rights of such judgment creditor. A judgment creditor becomes such by *legal proceedings* and obtains a lien on his debtor's assets by the levy of an execution. He then, indeed, is "a creditor . . . holding a lien thereon." We believe that in using the broad language now contained in 70(c), Congress deliberately avoided precise definition of the various types of lienholders whose status it conferred on the trustee in bankruptcy. Prior to 1950 and 1952 amendments to Section 70

(c), a distinction was drawn between property of the bankrupt which came into the possession of the bankruptcy court and that which did not. As to the former, the trustee was deemed vested "with all the rights, remedies, and powers of a creditor then holding a [fol. 49] lien thereon by legal or equitable proceedings" just as he is under the present wording without regard to possession. As to property not coming into possession of the court, however, he was deemed vested "with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied . . . ." To be sure, Congress in these amendments dropped explicit mention of judgment creditors and eliminated, for purposes of the trustee's rights, the distinction between property coming into his possession and that which does not. But "the legislative history indicates that it was the intention of Congress by the 1950 and 1952 amendments to *expand* the rights of a trustee in bankruptcy . . . ." *In re Fidelity Tube Corp.*, 278 F. (2) 776, 781 (3rd Cir. 1960). (Emphasis supplied.) We are persuaded that Congress intended to strengthen, not weaken, the trustee's rights against all forms of secret liens and retained the broader language, once used only as to property within the court's possession, so as to include all forms of lienholders, whether by judgment, levy of execution, or otherwise.

A trustee in bankruptcy obviously is not in fact a judgment creditor, but by Congressional Act he is "deemed vested . . . with all the rights, remedies, and powers" of a judgment creditor. One of the "rights, remedies, and powers" of a judgment creditor is the right to resist a government lien for taxes where notice thereof is not filed as required by Section 6323(a). The Bankruptcy Act does not say that the special rights conferred by Section 70(c) shall be effective against all liens except those for taxes imposed under Section 6321 of the Revenue Code. We do not understand the government to deny the general propriety of this reading. Instead, it asserts that although "Section 70c may give a trustee in bankruptcy *some of the rights of a judgment creditor*," and accords him "the status of a *hypothetical judgment creditor*," he does not have a judgment creditor's right to resist the

lien here involved. (Emphasis supplied.) No convincing reasons of policy are advanced for such an interpretation, which departs from the clear language of the statutes involved. Sections 70(c) of the Bankruptcy Act and 6323 (a) of the Internal Revenue Code of 1954, indeed, are both successors to statutes adopted to prevent the evils of secret liens, whether asserted by the United States or other creditors of a bankrupt. *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 363-64, 97 L. Ed. 1071, [fol. 50] 1075 (1953); *Sampsell* v. *Straub*, 194 F. (2) 228, 231 (9th Cir. 1951), *cert. denied*, 343 U. S. 927, 96 L. Ed. 1338 (1952). Accordingly, we are unable to agree that unrationalized concern for federal revenues should lead us to judicially amend a statute which expressly confers on the trustee not *some*, but *all* of the rights of a creditor holding a lien arising from legal proceedings.

Our view is at odds with majority opinions of the Second, Third and Ninth Circuits which have held for the government on the point here involved. *Brust* v. *Sturr*, 237 F. (2) 135 (2nd Cir. 1956); *In re Fidelity Tube Corp.*, 278 F. (2) 776 (3rd Cir. 1960), *cert. denied sub nom. Borough of East Newark* v. *United States*, 364 U. S. 828 (1960); *United States* v. *England*, 226 F. (2) 205 (9th Cir. 1955); *Simonson* v. *Granquist*, 287 F. (2) 489 (9th Cir. 1961), *reversed on other grounds*, 369 U. S. 38 (1962). Notwithstanding our respect for the learned judges of the majority in these cases, we find more persuasive the views expressed by the dissenters in *Fidelity Tube*, 278 F. (2) 782-787, and by Judge Hamley in *Simonson* v. *Granquist*, 287 F. (2) 490-491. We must concede too that our holding here appears to put us also in disagreement with dictum used in our own decision of *In re Taylorcraft Aviation Corp.*, 168 F. (2) 808, 810 (6th Cir. 1948). The dictum in that case was really in the nature of an aside observation because Section 70(c) of the Bankruptcy Act was not involved at all. Judge Allen, in dealing with the priority in bankruptcy of a mechanic's lien over a federal tax lien, *notice of which had been filed*, took occasion to say, "The trustee was not a judgment creditor . . . *and hence § 3672, Title 26, U. S. C.*,

26 U. S. C. A. Int. Rev. Code, § 3672 (predecessor to § 6323 I. R. C., 1954), has no application." (Emphasis supplied.) Our present decision does not conflict with Judge Allen's observation that a trustee in bankruptcy is not a judgment creditor since we rule only that Section 70(c), not considered by Judge Allen, gives him the *rights* of a judgment creditor.

The above decisions, with which we disagree, appear to hold that language employed by the United States Supreme Court in *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 364, 97 L. Ed. 1071, 1075 (1953), requires that we hold for the government. The *Gilbert* case did not deal with the Section 70(c) rights of a trustee in bankruptcy. The opposing claims there involved were based [fol. 51] on a federal tax lien and a tax lien assessed by the Town of Walpole, New Hampshire. The Supreme Court of New Hampshire had given priority to the town tax because of its holding that the assessment of a municipal tax " 'is in the nature of a judgment.' " The United States Supreme Court declined as a matter of federal law to accord the municipal or state taxing authority the status of a judgment creditor within the meaning of the lien statute. In so ruling, the Court said ". . . we think Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts." We do not feel that this language compelled the holdings of the cases with which we disagree and upon which the government here relies. It is our view that *Gilbert's* holding that a municipal tax creditor is not a "judgment creditor" for purposes of Section 6323(a), regardless of its status under state law, is inapposite to the question now before us. Such view, we believe, is supported by the reasons expounded in Judge Kalodner's dissenting opinion in *In re Fidelity Tube Corp.*, 278 F. (2) 785-86. We agree, too, with the statement of Judge Hamley in *Simonson* v. *Granquist*, 287 F. (2) 491:

> "But the Supreme Court did not say, and had no reason to say, that Congress could not make available to trustees in bankruptcy a defense which it originally made available only to judgment creditors. The defense having been created by Act of Congress, the

same legislative body was free to extend its benefits however it pleased."

We think that Judge Hamley spoke correctly in stating, "In my view this statute (§ 70(c)) states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one." *Ibid.*

An alternative position taken by the government in its brief to this Court is that even though the notice required by Section 6323(a) was not filed prior to bankruptcy, its lien gained priority over the trustee's title to the bankrupt's assets in February, 1961, at which time, it is claimed, a notice thereof was filed with the proper state authority. Reliance is placed on Section 67(b) of the Bankruptcy Act, 11 U.S.C. § 107(b). This contention is first made in the government's brief to this court and was [fol. 52] not presented to or considered in the bankruptcy proceedings or on review by the District Judge. The referee's certificate on review recited that "no notice of federal tax liens for internal revenue taxes was at any time filed in the office of the Recorder of Erie County, Ohio, nor the office of the Clerk of Court for this Judicial District." This was not challenged in the District Court. In his brief here, government counsel states "we have examined the record *in this case* and have found that notice of lien was filed with Carl A. Speir, Recorder, Erie County, Ohio, . . . on February 9, 1961. . . ." (Emphasis supplied.) From our own examination of the record *in this case*, we fail to find that such information constituted any part of the record. It is supplied by attaching to the government's brief a certified copy of a notice, obtained from the Recorder of Erie County on July 15, 1963. This date is after the filing of Notice of Appeal on April 17, 1963, and the filing of the record on appeal in this court on May 23, 1963.

Aside from our surface impression that there is no merit to this position of appellant, we will not consider a matter that was not before the District Court. *In re Frank Fehr Brewing Co.*, 268 F. (2) 170, 183 (6th Cir. 1959), *cert. denied*, 362 U.S. 963 (1960).

Judgment affirmed.

[fol. 53]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT—Filed August 4, 1964

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

/s/ Clifford O'Sullivan,
United States Circuit Judge

[fol. 55]

[Clerk's Certificate to Foregoing Transcript
Omitted in Printing]

[fol. 57]

SUPREME COURT OF THE UNITED STATES

No. 646, October Term, 1964

UNITED STATES, PETITIONER

vs.

RAY F. SPEERS, Trustee in Bankruptcy of the Kurtz Roofing Company, etc.

ORDER ALLOWING CERTIORARI—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 762999 579

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

UNITED STATES OF AMERICA, PETITIONER

v.

RAY F. SPEERS, TRUSTEE IN BANKRUPTCY OF THE KURTZ ROOFING COMPANY, f/d/b/a KURTZ SUPPLY COMPANY, BANKRUPT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above-entitled case.

OPINIONS BELOW

The order of the district court (R. 43a)[1] is not officially reported. The opinion of the court of appeals (App. 9-16) is reported at 335 F. 2d 311.

[1] "R." references are to the record Appendix B printed as a part of the Brief for the Appellant in the court of appeals. "App." references are to the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1964 (App. 17). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal tax lien is valid in bankruptcy although notice of the lien is not filed before the date of bankruptcy.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6321. LIEN FOR TAXES

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof

has been filed by the Secretary or his delegate * * *.

* * * *

Bankruptcy Act, c. 541, 30 Stat. 544, as amended (11 U.S.C., Secs. 107, 110):

Sec. 67. *Liens and Fraudulent Transfers*—

* * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding * * * statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws * * *.

Sec. 70, *Title to Property.*

* * * *

c. * * * The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

STATEMENT

On June 3, 1960, the District Director assessed withholding taxes and interest totalling $14,149.08 against Kurtz Roofing Company and on the same day made demand for payment. On June 20, 1960, Kurtz filed a voluntary petition in bankruptcy. No notice of the federal tax lien was filed prior to bankruptcy. (R. 31a-33a). The trustee refused to recognize the United States as a secured claimant and instead treated it as an unsecured claimant entitled to the fourth priority that Section 64a(4) of the Bankruptcy Act gives for taxes legally due and owing (11 U.S.C. 104(a)(4)). The trustee proposed first to pay in full the claims of other secured creditors and administrative expenses and then to pay out of the $13,893.02 remaining in the bankrupt estate a dividend of 53.48 percent on the federal tax claims and on unsecured State and local claims (R. 29a-30a). The referee (R. 34a-41a), the district court (R. 43a), and the court of appeals (App. 9-16) sustained the position of the trustee.

The court of appeals based its decision on Section 6323(a) of the Internal Revenue Code of 1954 (*supra*, pp. 2-3) and Section 70c of the Bankruptcy Act (*supra*, p. 3). Section 6323(a) provides that a federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor unless notice thereof has been filed * * *." Section 70c provides that a trustee in bankruptcy shall be deemed vested, as of the date of bankruptcy, "with all the rights, remedies, and powers" of a creditor holding

a lien by legal or equitable proceedings as of the date of bankruptcy, whether or not such a creditor actually exists. Reading the provisions together, the court held that since Section 70c gives the trustee all the rights of a judgment creditor as of the date of bankruptcy, and since notice of the lien was not filed prior to bankruptcy, Section 6323(a) operated to invalidate the federal tax lien in bankruptcy.

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with the decisions of three other circuits. Review by this Court is necessary to resolve the conflict on an issue which recurs frequently and is thus of substantial administrative importance: whether notice of a federal tax lien must be filed before the date of bankruptcy if the lien is to be valid in bankruptcy proceedings.

1. As the court below noted (App. 13), its decision is in direct conflict with the decisions of the Second Circuit in *Brust* v. *Sturr*, 237 F. 2d 135; the Third Circuit in *In re Fidelity Tube Corp.*, 278 F. 2d 776, certiorari denied *sub nom. Borough of East Newark* v. *United States*, 364 U.S. 828; and the Ninth Circuit in *United States* v. *England*, 226 F. 2d 205, and *Simonson* v. *Granquist*, 287 F. 2d 489, reversed on other grounds, 369 U.S. 38. In *Simonson* v. *Granquist* this Court granted the trustee's petition for certiorari on the same issue now presented, although there was then no conflict of decisions (Oct. Term, 1960, No. 919, 366 U.S. 943). The Court's disposition of the case, however, made unnecessary a determination of the question (369 U.S. 38, fn. 1).

The question is a recurring one and has considerable administrative importance. We have been advised informally that there are approximately 1,250 bankruptcy cases each year involving federal tax liens, and that notices of liens are not filed before bankruptcy in approximately one-third of these cases, or about 400 cases a year. At present the issue is generally disposed of summarily upon the authority of the Second, Third, and Ninth Circuit decisions, but such summary disposition cannot continue in light of the decision below.

2. The government believes that the decision below is erroneous and that the conflicting decisions of the Second, Third, and Ninth Circuits are correct. Section 6323 of the Code, and its predecessor provisions, were intended to protect four classes of creditors against unfiled government tax liens. One of the protected classes is creditors who have obtained a court decree "in the usual, conventional sense of a judgment of a court of record * * *." *United States* v. *Gilbert Associates*, 345 U.S. 361, 364. A trustee in bankruptcy is not such a creditor and the Bankruptcy Act plainly was not intended to treat him as such a creditor for purposes of invalidating unrecorded federal tax liens. This is evident both from other provisions of the Act and from its purposes. The construction given Section 70c of the Bankruptcy Act by the court below cannot be reconciled with Section 67b of the same Act. Under the decision below no federal tax lien can be valid in bankruptcy if notice of the lien was not filed prior to bankruptcy. But Section 67b (*supra*, p. 3) states flatly that a

federal tax lien will be valid if it is perfected after bankruptcy "in accordance with the requirements" of the law creating the lien. Section 67b thus in terms permits what the court below held Section 70c impliedly prohibits: the perfection of the federal lien after bankruptcy.

The decision of the court below is also inconsistent with the purposes of the two statutes it construed. Invalidating all unrecorded federal tax liens grants no additional protection to general creditors, for the tax claim will still be paid ahead of general creditors as a fourth priority claim under Section 64 of the Bankruptcy Act. Nor does it afford added protection to the four classes of creditors referred to in Section 6323 of the Internal Revenue Code of 1954, for their claims are secured and superior to the federal lien by virtue of that section alone. On the other hand, the decision below grants an unexplainable and unjustified priority over federal tax liens to creditors with inchoate liens, even if acquired after the federal tax lien arose, so long as State law makes those liens superior to that of a judgment creditor. And it permits wholly unsecured tax claims of States and municipalities to share equally with the secured claims of the United States, despite the protective purposes of the federal tax lien. These results were not intended by Congress. See, 4 Collier, *Bankruptcy* (14th ed., 1962 rev.), pars. 70.47-70.49.[2]

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[2] Legislation repeatedly has been proposed in recent years to constitute a trustee in bankruptcy a "judgment creditor" with respect to federal tax liens. The most recent bill was H.R. 394, 88th Cong., 2d Sess., Sec. 6. None of these bills

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

I. HENRY KUTZ,
KARL SCHMEIDLER,
Attorneys.

NOVEMBER 1964.

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has been enacted into law. The committee reports on these bills all underscore the fact that only Congressional action can accomplish this result. For example, see S. Rep. No. 1133, 88th Cong., 2d Sess., pp. 10-11, on H.R. 394.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15405

In the Matter of

THE KURTZ ROOFING COMPANY,
d/b/a KURTZ SUPPLY COMPANY,
Bankrupt,
UNITED STATES OF AMERICA,
Appellant,

v.

RAY F. SPEERS, Trustee in Bankruptcy, *Appellee*.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided August 4, 1964.

Before: CECIL and O'SULLIVAN, Circuit Judges, and MCALLISTER, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. Section 6323(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 6323(a), protects a "judgment creditor" against unfiled federal tax liens. This appeal requires us to decide whether Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c), confers upon a trustee in bankruptcy

the right of a judgment creditor to resist imposition on the bankrupt's assets of a federal tax lien not filed prior to bankruptcy. The referee in bankruptcy and the District Judge held that the trustee had such right, and treated the government on a par with other priority claimants, as provided in Section 64(a) of the Bankruptcy Act, 11 U.S.C. § 104(a). We agree with this ruling. Under it, the government will receive 53.48% of $14,149.08, the amount for which it asserts a lien.

The government taxes here involved were assessed against Kurtz Supply Company on June 3, 1960. That company was adjudicated a bankrupt on June 20, 1960. Under Sections 6321 and 6322 of Int. Rev. Code of 1954, 26 U.S.C. §§ 6321, 6322, the asserted federal tax lien was perfected as of the date of assessment and demand, June 3, 1960. Section 6323(a) of the Code, however, provides that:

> ". . . the lien imposed by section 6321 *shall not be valid* as against any mortgagee, pledgee, purchaser, or *judgment creditor* until notice thereof has been filed by the Secretary or his delegate . . . ." (Emphasis supplied.)

No such notice was filed in this case prior to bankruptcy.

Section 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c), provides in pertinent part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankrutpcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding

> a lien thereon by such proceedings, whether or not such a creditor actually exists."

The question before us, then, is whether the words "a creditor then holding a lien" upon the bankrupt's assets "by legal . . . proceedings" describe, among others, a judgment creditor. If so, the bankruptcy trustee, under 70(c), has all the rights of such judgment creditor. A judgment creditor becomes such by *legal proceedings* and obtains a lien on his debtor's assets by the levy of an execution. He then, indeed, is "a creditor . . . holding a lien thereon." We believe that in using the broad language now contained in 70(c), Congress deliberately avoided precise definition of the various types of lienholders whose status it conferred on the trustee in bankruptcy. Prior to 1950 and 1952 amendments to Section 70(c), a distinction was drawn between property of the bankrupt which came into the possession of the bankruptcy court and that which did not. As to the former, the trustee was deemed vested "with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings" just as he is under the present wording without regard to possession. As to property not coming into possession of the court, however, he was deemed vested "with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied . . . ." To be sure, Congress in these amendments dropped explicit mention of judgment creditors and eliminated, for purposes of the trustee's rights, the distinction between property coming into his possession and that which does not. But "the legislative history indicates that it was the intention of Congress by the 1950 and 1952 amendments to *expand* the rights of a trustee in bank-

ruptcy . . . ." *In re Fidelity Tube Corp.*, 278 F. (2) 776, 781 (3rd Cir. 1960). (Emphasis supplied.) We are persuaded that Congress intended to strengthen, not weaken, the trustee's rights against all forms of secret liens and retained the broader language, once used only as to property within the court's possession, so as to include all forms of lienholders, whether by judgment, levy of execution, or otherwise.

A trustee in bankruptcy obviously is not in fact a judgment creditor, but by Congressional Act he is "deemed vested . . . with all the rights, remedies, and powers" of a judgment creditor. One of the "rights, remedies, and powers" of a judgment creditor is the right to resist a government lien for taxes where notice thereof is not filed as required by Section 6323 (a). The Bankruptcy Act does not say that the special rights conferred by Section 70(c) shall be effective against all liens except those for taxes imposed under Section 6321 of the Revenue Code. We do not understand the government to deny the general propriety of this reading. Instead, it asserts that although "Section 70c may give a trustee in bankruptcy *some of the rights of a judgment creditor*," and accords him "the status of a *hypothetical judgment creditor*," he does not have a judgment creditor's right to resist the lien here involved. (Emphasis supplied.) No convincing reasons of policy are advanced for such an interpretation, which departs from the clear language of the statutes involved. Sections 70 (c) of the Bankruptcy Act and 6323(a) of the Internal Revenue Code of 1954, indeed, are both successors to statutes adopted to prevent the evils of secret liens, whether asserted by the United States or other creditors of a bankrupt. *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 363-64, 97 L. Ed. 1071,

1075 (1953); *Sampsell* v. *Straub*, 194 F. (2) 228, 231 (9th Cir. 1951), *cert. denied*, 343 U. S. 927, 96 L. Ed. 1338 (1952). Accordingly, we are unable to agree that unrationalized concern for federal revenues should lead us to judicially amend a statute which expressly confers on the trustee not *some*, but *all* of the rights of a creditor holding a lien arising from legal proceedings.

Our view is at odds with majority opinions of the Second, Third and Ninth Circuits which have held for the government on the point here involved. *Brust* v. *Sturr*, 237 F. (2) 135 (2nd Cir. 1956); *In re Fidelity Tube Corp.*, 278 F. (2) 776 (3rd Cir. 1960), *cert. denied sub nom. Borough of East Newark* v. *United States*, 364 U. S. 828 (1960); *United States* v. *England*, 226 F. (2) 205 (9th Cir. 1955); *Simonson* v. *Granquist*, 287 F. (2) 489 (9th Cir. 1961), *reversed on other grounds*, 369 U. S. 38 (1962). Notwithstanding our respect for the learned judges of the majority in these cases, we find more persuasive the views expressed by the dissenters in *Fidelity Tube*, 278 F. (2) 782-787, and by Judge Hamley in *Simonson* v. *Granquist*, 287 F. (2) 490-491. We must concede too that our holding here appears to put us also in disagreement with dictum used in our own decision of *In re Taylorcraft Aviation Corp.*, 168 F. (2) 808, 810 (6th Cir. 1948). The dictum in that case was really in the nature of an aside observation because Section 70(c) of the Bankruptcy Act was not involved at all. Judge Allen, in dealing with the priority in bankruptcy of a mechanic's lien over a federal tax lien, *notice of which had been filed*, took occasion to say, "The trustee was not a judgment creditor . . . *and hence § 3672, Title 26, U. S. C., 26 U. S. C. A. Int. Rev. Code, § 3672 (predecessor to § 6323 I. R. C., 1954), has no application.*" (Emphasis supplied.)

Our present decision does not conflict with Judge Allen's observation that a trustee in bankruptcy is not a judgment creditor since we rule only that Section 70(c), not considered by Judge Allen, gives him the *rights* of a judgment creditor.

The above decisions, with which we disagree, appear to hold that language employed by the United States Supreme Court in *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 364, 97 L. Ed. 1071, 1075 (1953), requires that we hold for the government. The *Gilbert* case did not deal with the Section 70(c) rights of a trustee in bankruptcy. The opposing claims there involved were based on a federal tax lien and a tax lien assessed by the Town of Walpole, New Hampshire. The Supreme Court of New Hampshire had given priority to the town tax because of its holding that the assessment of a municipal tax " 'is in the nature of a judgment.' " The United States Supreme Court declined as a matter of federal law to accord the municipal or state taxing authority the status of a judgment creditor within the meaning of the lien statute. In so ruling, the Court said ". . . we think Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts." We do not feel that this language compelled the holdings of the cases with which we disagree and upon which the government here relies. It is our view that *Gilbert's* holding that a municipal tax creditor is not a "judgment creditor" for purposes of Section 6323(a), regardless of its status under state law, is inapposite to the question now before us. Such view, we believe, is supported by the reasons expounded in Judge Kalodner's dissenting opinion in *In re Fidelity Tube Corp.*, 278 F.

(2) 785-86. We agree, too, with the statement of Judge Hamley in *Simonson* v. *Granquist*, 287 F. (2) 491:

> "But the Supreme Court did not say, and had no reason to say, that Congress could not make available to trustees in bankruptcy a defense which it originally made available only to judgment creditors. The defense having been created by Act of Congress, the same legislative body was free to extend its benefits however it pleased."

We think that Judge Hamley spoke correctly in stating, "In my view this statute (§ 70(c)) states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one." *Ibid.*

An alternative position taken by the government in its brief to this Court is that even though the notice required by Section 6323(a) was not filed prior to bankruptcy, its lien gained priority over the trustee's title to the bankrupt's assets in February, 1961, at which time, it is claimed, a notice thereof was filed with the proper state authority. Reliance is placed on Section 67(b) of the Bankruptcy Act, 11 U.S.C. § 107(b). This contention is first made in the government's brief to this court and was not presented to or considered in the bankruptcy proceedings or on review by the District Judge. The referee's certificate on review recited that "no notice of federal tax liens for internal revenue taxes was at any time filed in the office of the Recorder of Erie County, Ohio, nor the office of the Clerk of Court for this Judicial District." This was not challenged in the District Court. In his brief here, government counsel states "we have examined the record *in this case* and have found that

notice of lien was filed with Carl A. Speir, Recorder, Erie County, Ohio, . . . on February 9, 1961. . . ." (Emphasis supplied.) From our own examination of the record *in this case*, we fail to find that such information constituted any part of the record. It is supplied by attaching to the government's brief a certified copy of a notice, obtained from the Recorder of Erie County on July 15, 1963. This date is after the filing of Notice of Appeal on April 17, 1963, and the filing of the record on appeal in this court on May 23, 1963.

Aside from our surface impression that there is no merit to this position of appellant, we will not consider a matter that was not before the District Court. *In re Frank Fehr Brewing Co.*, 268 F. (2) 170, 183 (6th Cir. 1959), *cert. denied*, 362 U. S. 963 (1960).

Judgment affirmed.

JUDGMENT

(Filed Aug. 4, 1964)

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Approved for entry:

/s/ Clifford O'Sullivan,
United States Circut Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 646.

UNITED STATES OF AMERICA,
Petitioner,

v.

RAY F. SPEERS,
Trustee in Bankruptcy of The Kurtz Roofing Company, f/d/b/a/ Kurtz Supply Company, Bankrupt,
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

The Trustee in Bankruptcy of Kurtz Roofing Company opposes the petition for writ of certiorari filed herein because (1) This case was correctly decided by the United States Court of Appeals for the Sixth Circuit,[1] (2) Congressional action has been initiated to confirm the statutory construction which that court adopted and (3) The "administrative importance" of this issue is inconsequential inasmuch as the bankruptcy courts and their trustees are, in effect, a major collecting agency for the Internal Revenue Service.

[1] The court's opinion, written by Judge O'Sullivan, is reprinted at pages 9-16, Appendix to Petition for Certiorari.

COUNTER STATEMENT OF QUESTION PRESENTED.

Does the vested judicial lien of the bankruptcy trustee[2] have priority over a federal tax lien based only on assessment and non-payment of tax[3] without the filing of required statutory notice?[4]

The bankruptcy referee, the United States District Court and the United States Court of Appeals for the Sixth Circuit, have answered this question "Yes" and this is the correct answer.

The Court of Appeals opinion, 335 F. 2d 311 (August 4, 1964) concisely outlines the sound rationale of its conclusion, and recent congressional committee reports corroborate its interpretation of the original legislative intent.[5]

STATUTES INVOLVED.

Respondent agrees that the statutes for consideration on this petition are Section 70c. of the Bankruptcy act[6] and 26 U. S. C. Sections 6321 and 6323.

Section 67b. of the Bankruptcy Act[7] is not applicable for two reasons. First, this section simply removes late-filed tax liens from the category of voidable preferences. 4 *Collier on Bankruptcy* Sec. 67.24, p. 240. Second, the filing of notice in accordance with 26 U. S. C. Section 6323(a) is the significant fact in this regard, and the record does not disclose that such notice was ever filed.[8]

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[2] Section 70c. of the Bankruptcy Act, 11 U. S. C. Section 110(c).

[3] 26 U. S. C. Section 6321.

[4] 26 U. S. C. Section 6323(a).

[5] Sen. Rept. No. 1133, 88th Cong., 2nd Sess., p. 11; House Report No. 454, 88th Cong. 1st Sess., p. 10.

[6] 11 U. S. C. Section 110(c).

[7] 11 U. S. C. Section 107(b).

[8] Pet. for Cert., App., p. 16.

STATEMENT.

On June 20, 1960, Kurtz Roofing Company filed its voluntary petition in bankruptcy and was adjudicated bankrupt on the same day. Sale of its assets produced only $17,680. After payment of secured claims, expenses of sale and costs of administration, the balance remaining was insufficient to pay claims other than priority tax claims. The dividend on these was 53.48%, or $11,127.61.

Distribution proposed was $9,202.35 on the federal tax claim and $1,925.26 on state and local tax claims. R. 9a. Liquidation sales expense had been paid as an expense of bankruptcy administration.[9]

The failure, prior to the date of bankruptcy, to file the statutory notice called for by 26 U. S. C. Section 6323(a) is the primary fact raising the legal issue on this appeal. The trustee contends that without such notice, the government tax lien under 26 U. S. C. Section 6321 is subordinate to the trustee's rights created by Section 70c. of the Bankruptcy Act.[10]

The government contends that despite the secret nature of the tax lien before notice is filed, a trustee in bankruptcy is not a "judgment creditor" such that this secret lien is invalid as to him. It admits that a trustee in bankruptcy has been granted *some* of the rights of a judgment creditor but rejects the statutory recitation that a trustee shall have "all" such rights.[11]

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[9] Auctioneers commissions and expenses, rent and storage expenses alone amounted to $2,196.28. R. 8a.

[10] 11 U. S. C. Section 110(c).

[11] Court of Appeals, Opinion, Pet. for Cert., App., p. 12.

REASONS FOR DENYING CERTIORARI.

1. This case was correctly decided by the Court of Appeals for the Sixth Circuit. The court's opinion was written by Judge O'Sullivan[12] and carefully presents the controlling reasons supporting its conclusion. That court relied on the unambiguous language of the two federal statutes involved. 26 U. S. C. Section 6323(a) makes special concessions in favor of a judgment creditor, and Section 70c. of the Bankruptcy Act, 11 U. S. C. Section 110(c) vests in a bankruptcy trustee all the legal rights of a broad category of creditors which includes a judgment creditor. From this, it concluded that Congress intended a trustee in bankruptcy to have all of the rights of a judgment creditor.

The appellate court's opinion says, "We think that Judge Hamley spoke correctly in stating, 'In my view this statute [§ 70(c)] states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one.' " [13]

Language is the "dependable guide" to statutory meaning. *Simonson, Trustee v. Granquist, District Director,* 369 U. S. 38, 40 (1962). "First reference is * * * to the literal meaning of the word employed" [*Flora v. United States,* 357 U. S. 63, 65 (1958)], and statutes are to be applied "on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Ry. Co.,* 343 U. S. 562, 575 (1952).

The Court of Appeals properly analyzed this Court's decision in *United States v. Gilbert Associates, Inc.,* 345 U. S. 361, 363-364 (1953). The municipal tax creditor there involved did not have specific Congressional grant of

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[12] Pet. for Cert., App., p. 15.

[13] *Simonson v. Granquist,* 287 F. 2d 489, 491 (9 Cir. 1961).

the rights of a judicial lien creditor as does a bankruptcy trustee. *Myers, Trustee v. Matley*, 318 U. S. 622, 627 (1943).

The correctness of this Sixth Circuit decision will stand out clearly in a comparison of its reasoning and analysis of authority with that of the majority opinion in the case of *In re Fidelity Tube Corp.*, 278 F. 2d 776 (3 Cir. 1960), cert. den. 364 U. S. 828.

2. Congress is taking steps to resolve any court conflicts on this question, and, as petitioner suggests, this, rather than further court decisions,[14] might be the only solution. However, we believe petitioner has misinterpreted the significance of Senate Report No. 1133, 88th Congress, 2nd Session.[15] This document restates the legis-

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[14] Government appeals have changed this case from a bankruptcy referee's ruling in a single division to a Court of Appeals judgment for an entire appellate circuit.

[15] At page 11, this report says:

"The effect of these decisions is that the Federal Government's unrecorded tax lien prevails over the rights of the trustee under section 70c. *This would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial lien creditor.* Prior to 1950, the trustee was given the status of a judicial lien creditor as to all property coming into the possession of the bankruptcy court. As to all other property, he was given the rights of a judgment creditor holding an execution returned unsatisfied. In 1950, the distinction which turned on possession was eliminated and the trustee was simply given the rights of a judicial lien creditor. The House report which accompanied the bill indicates that the purpose of Congress was not to contract but rather to expand the rights of the trustee under section 70c. The report states that the amendment to section 70c—'has been placed in the bill for the protection of trustees in bankruptcy as correlative to the amendment to section 60, and also to simplify, and to some extent expand, the general expression of the rights of trustees in bankruptcy (H. Rept. 1293, 81st Cong., 2d sess., p. 7 (1949)).'

As a matter of general law, the holder of a lien by legal proceedings has greater rights than a judgment creditor who usually has no rights in the personal property of the debtor by virtue

(Continued on following page)

lative intent that a bankruptcy trustee shall have all the rights of a judgment creditor. It gives clear indication that Congress will resolve this issue and will confirm the position of the Sixth Circuit Court of Appeals in this case.[16]

3. In referring to "administrative importance," petitioner overlooks some practical considerations. Statistical

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(Continued from preceding page)

of his judgment. Even as to real property it is frequently necessary for the judgment creditor to take further action after judgment to create a lien. It would seem anomalous to allow judgment creditors to prevail over secret tax liens and to deny that right to a judicial lien holder. As against liens and transfers other than Federal tax liens, it has generally been held that a trustee in bankruptcy does have the rights of a judgment creditor. See, e.g., *McKay v. Trusco Finance Co.* (198 F. 2d 431 (5th Cir. 1952)); *Sampsell v. Straub* (194 F. 2d 228 (9th Cir. 1951)); cert. denied, 343 U. S. 927 (1952).

The need for forthright congressional action in this matter was underscored by the decision in *Fidelity Tube, supra.* There the court pointed to the fact that legislation clarifying the status of the judgment creditor was pending before Congress and further declared that it considered the enactment of such legislation necessary if the trustee was to have the status of a judgment creditor vis-a-vis the Federal tax lien.

In order to assure the trustee of this status, section 6 of H. R. 394, as reported, specifically provides that a trustee shall have the rights and powers of 'a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists." (Emphasis added.)

[16] House Report No. 454, 88th Cong. 1st Session (to accompany H. R. 394), p. 10, also expresses the opinion that the effect of *In re Fidelity Tube Corp., supra,* "would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial creditor."

H. R. 394 provided: "The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, * * *." It was passed by the House of Representatives on July 8, 1963. Although reported favorably by the Senate Judiciary Committee in June, 1964, it was recommitted to the Senate Finance Committee and no further action was taken by the Senate.

records of the United States Courts[17] establish that, annually, only 20% of the total bankruptcy proceedings are filed in the Sixth Circuit.[18] Thus, on the basis of this percentage, this case is concerned with only about 80 of the 400 federal tax lien situations which petitioner claims to be significant.

These statistics disclose that in 1963 bankruptcy courts paid $9,283,454 in priority tax claims. This amounted to 68% of all priority distributions.[19] Applying this same percentage to priority distributions for the two prior years, tax claim payments by bankruptcy trustees can be estimated at $6,670,000 in 1962 and $7,180,000 in 1961.[20]

Three conclusions are suggested. The interests of the government and the bankruptcy trustees are not truly adverse. Bankruptcy trustees are important tax collectors for federal, state and local governments. And, in many cases, tax claims are collected and paid in full from bankrupt estates without reduction for expenses of administration or sale.

If "administrative importance" is relevant to the petition for certiorari, it is appropriate to note that the extensive rights granted to bankruptcy trustees by Section 70c. of the Bankruptcy Act benefit priority tax claimants as well as all others who are entitled to distributions from bankrupt estates.

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[17] Tables of Bankruptcy Statistics for the Fiscal Years Ending 1961, 1962 and 1963, prepared in accordance with Section 53 of the Bankruptcy Act by the Administrative Office of the United States Courts.

[18] Id. 1963, p. 4, Table F 2; id. 1962, pp. 1, 3.

[19] Id. 1963, Table F 5.

[20] Id. 1962, Table F 6; id. 1961, Table F 6.

CONCLUSION.

The decision of the Court of Appeals for the Sixth Circuit was correct.

The question posed by petitioner will probably soon be answered (in agreement with the Sixth Circuit decision) by Congressional action. No "administrative importance" warrants determination by this Court prior to such legislation.

The petition for certiorari should be denied.

Respectfully submitted,

ROBERT B. GOSLINE, ESQUIRE,
SHUMAKER, LOOP & KENDRICK,
811 Madison Avenue,
Toledo, Ohio 43624,

FRANK BUCKINGHAM, ESQUIRE,
BUCKINGHAM, HOLZAPFEL & BUCKINGHAM,
231 W. Washington Row,
Sandusky, Ohio,

Attorneys for Respondent,
Ray F. Speers, Trustee.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 646

UNITED STATES OF AMERICA, PETITIONER

v.

RAY F. SPEERS, TRUSTEE IN BANKRUPTCY OF THE KURTZ ROOFING COMPANY, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The Referee's memorandum opinion (R. 35–41) is not officially reported. The district court rendered no opinion; its order is not reported. The opinion of the court of appeals (R. 44–49) is reported at 335 F. 2d 311.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1964 (R. 50). The petition for a writ of certiorari was filed on November 2, 1964, and was granted on January 18, 1965 (R. 51). The jurisdiction of this Court rests on Section 24c of the Bankruptcy Act, as amended (11 U.S.C. 47(c)), and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal tax lien is valid in bankruptcy where the perfected lien arises before bankruptcy but where notice of the lien is not filed before the date of bankruptcy.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954, the Bankruptcy Act, as amended, and the Treasury Regulations on Procedure and Administration (1954 Code) are set forth in the Appendix, *infra*.

STATEMENT

On June 3, 1960, the District Director of Internal Revenue assessed withholding taxes and interest of more than $14,000.00 against The Kurtz Roofing Company. On the same day the District Director made demand for payment, thus giving rise to a perfected tax lien against all of Kurtz's property under Section 6321 of the Internal Revenue Code of 1954 (26 U.S.C., App. *infra*). Seventeen days later, on June 20, 1960, Kurtz filed a voluntary petition in bankruptcy. Notice of the federal tax lien was not filed prior to the date of bankruptcy.[1] (R. 3–4, 12, 23–26, 29–30, 31–33.)

The trustee in bankruptcy refused to recognize the United States as a secured claimant through its per-

[1] In his Certificate on Petition for Review, the referee stated that notice of the federal tax lien was never filed (R. 32, 35). In fact, notice of lien was filed with Carl A. Speir, Recorder, Erie County, Ohio, the county in which the property subject to the liens was situated, on February 9, 1961. See Appendix C to the brief of the appellant in the court of appeals contained in the unprinted record on file with this Court.

fected lien. Instead, he treated the United States as an unsecured claimant entitled only to the fourth priority of payment under Section 64a(4) of the Bankruptcy Act, as amended (11 U.S.C. 104(a)(4), App., *infra*), for unsecured claims for taxes legally due and owing. As a result, although other secured creditors would be paid in full, the trustee proposed to pay only a pro rata dividend of 53.48 percent on the federal tax claims and on unsecured state and local tax claims (R. 8–10, 29, 45). The referee (R. 11–12, 33–41), the district court (R. 42–43), and the court of appeals (R. 44–49) sustained the position of the trustee.

ARGUMENT

PERFECTED FEDERAL TAX LIENS ARISING BEFORE BANKRUPTCY ARE VALID IN BANKRUPTCY EVEN THOUGH NOTICE OF LIEN IS NOT FILED PRIOR TO BANKRUPTCY

Introduction and Summary

Under Section 6321 of the Internal Revenue Code of 1954, an unsatisfied demand for delinquent taxes creates "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to" the taxpayer. Such a perfected lien arose in this case against the taxpayer's property seventeen days before the voluntary petition in bankruptcy was filed by the taxpayer. The question for decision here is whether this lien remained valid after the taxpayer's voluntary bankruptcy. The court of appeals has held that the lien did not remain valid because of the government's failure to file notice of the lien prior to bankruptcy.

The court of appeals based its decision upon a joint reading of Section 6323(a) of the 1954 Code (*infra*) and Section 70c of the Bankruptcy Act (*infra*). Section 6323(a) provides that a federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor unless notice thereof has been filed * * *." Section 70c provides that a trustee in bankruptcy shall be deemed vested, as of the date of bankruptcy, "with all the rights, remedies, and powers" of a creditor holding a lien by legal or equitable proceedings as of the date of bankruptcy, whether or not such a creditor actually exists. The court reasoned that since Section 70c thus gives the trustee all the rights of a hypothetical judgment creditor as of the date of bankruptcy, he is to be deemed a "judgment creditor" within the meaning of Section 6323(a). As a result, the court held that if notice of a perfected federal tax lien is not filed prior to bankruptcy, the lien is necessarily invalid in bankruptcy.

We contend that the two sections should not be thus read to work an automatic invalidation of the federal lien upon bankruptcy. We submit, first, that, absent the trustee's designation as the holder of the powers of a hypothetical judgment creditor in Section 70c, a trustee in bankruptcy would clearly not be within the limited classes of persons to whom Section 6323(a) gives power to invalidate tax liens. That section, of its own force, was meant to benefit only mortgagees, pledgees, purchasers and judgment creditors "in the usual, conventional sense," who have an equitable claim to come before the prior but unrecorded federal tax

lien. The trustee clearly is not such a judgment creditor in the conventional sense and neither he nor the small class of creditors who would be benefitted by invalidation of the federal lien come within the equitable purpose of Section 6323(a).

If we are correct that, in the absence of Section 70c, the trustee would not be a "judgment creditor" under Section 6323(a), the case turns upon whether Section 70c, by giving the trustee the powers of a creditor holding a lien by judicial or equitable proceedings as of the date of bankruptcy, intended to incorporate within the powers thus conferred the power of a "judgment creditor" under Section 6323(a) to invalidate prior unrecorded federal tax liens. We submit that Section 70c cannot properly be so read. To do so would make it flatly inconsistent with a companion section of the Bankruptcy Act (Section 67b), would create wholly unwarranted windfalls to certain creditors as a result of bankruptcy and would unjustifiably place unsecured claims for State and local taxes on a par with prior secured federal tax claims. The general provisions of Section 70c, which are not focused upon the particular problem of the validity of federal tax liens, should therefore not be read as expanding the carefully restricted priorities created by Section 6323 (a). We do not doubt the power of Congress to include appropriate language in the Bankruptcy Act giving the trustee in bankruptcy a priority over prior unrecorded federal tax liens, but Congress has not done so. Congress might also explicitly add trustees in bankruptcy to the categories of persons described in Section 6323(a) as against whom the federal tax lien is invalid

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until notice thereof is filed, but again Congress has not done so.

A. THE TRUSTEE IN BANKRUPTCY IS NOT A "JUDGMENT CREDITOR" WITHIN THE MEANING OF SECTION 6323(a) OF THE INTERNAL REVENUE CODE OF 1954.

In order for a creditor to invalidate an unfiled tax lien of the United States under Section 6323(a) of the Internal Revenue Code of 1954, he must either be a "mortgagee, pledgee, purchaser or judgment creditor." This Court held in 1953 in *United States* v. *Gilbert Associates*, 345 U.S. 361, 364, that Congress used the words "judgment creditor" to refer to creditors who have obtained a court decree "in the usual, conventional sense of a judgment of a court of record * * *." See also *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 52 (Jackson, J., concurring).[2] This judicial definition was adopted in the Treasury Regulations on Procedure and Administration (1954 Code) Section 301.6323–1(a)(2)(i)(b) and (ii) (Appendix, *infra*):

> The term "judgment creditor" means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money * * *.

[2] Likewise, this Court has held that a "purchaser" is "one who acquires title for a valuable consideration in the manner of vendor or vendee". *United States* v. *Scovil*, 348 U.S. 218, 221. Accord, *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010, reversing 227 F. 2d 359 (C.A. 7), rehearing denied, 351 U.S. 958; *United States* v. *Acri*, 348 U.S. 211, 213–214. See also, *United States* v. *Chapman*, 281 F. 2d 862, 868–869 (C.A. 10); *United States* v. *Hawkins*, 228 F. 2d 517 (C.A. 9); *New York Terminal Warehouse Co.* v. *Bullington*, 213 F. 2d 340, 344 (C.A. 5); *National Refining Co.* v. *United States*, 160 F. 2d 951, 955 (C.A. 8). With respect to the word "mortgagee", see *United States* v. *Ball Construction Co.*, 355 U.S. 587, rehearing denied, 356 U.S. 934, reversing *per curiam* 239 F. 2d 384 (C.A. 5).

By the standard thus adopted in *Gilbert Associates* and incorporated in the Regulations, a trustee in bankruptcy is clearly not a "judgment creditor" under Section 6323(a), for he plainly does not obtain a judgment against the bankrupt in the "conventional sense." For this reason, every court of appeals which considered this question prior to the decision of the Sixth Circuit in this case held that the powers conferred upon the trustee by Section 70c of the Bankruptcy Act did not constitute him a "judgment creditor" under Section 6323(a) or its predecessors.[3] *United States* v. *England*, 226 F. 2d 205 (C.A. 9); *Brust* v. *Sturr*, 237 F. 135 (C.A. 2); *In re Fidelity Tube Corp.*, 278 F. 2d 776 (C.A. 3), certiorari denied *sub nom. Borough of East Newark* v. *United States*, 364 U.S. 828; *Simonson* v. *Granquist*, 287 F. 2d 489 (C.A. 9), reversed on other grounds, 369 U.S. 38. See also, *In the Matter of Green*, 124 F. Supp. 481 (N.D. Ala.); *In re Ann Arbor Brewing Co.*, 110 F. Supp. 111, 115–116 (E.D. Mich.); *In re Estrada's Market*, 222 F. Supp. 253, 256 (S.D. Calif.); *In re Taylorcraft Aviation Corp.*, 168 F. 2d 808, 810 (C.A. 6) (dictum).

That "judgment creditor" in Section 6323(a) means judgment creditor "in the usual, conventional sense" and does not, of its own force, extend to a trustee in bankruptcy, is substantiated by the purpose of Section 6323(a) as shown by its history. Initially, there was no provision in the tax lien statute giving any subsequent creditors preference over a prior but unfiled federal tax lien. Revised Statutes, Section 3186, as amended by Section 3 of the Act of March 1, 1879, c. 125, 20

[3] The immediate predecessor to Section 6323(a) was Section 3672(a) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed. 3672(a)).

Stat. 327, 331.[4] In 1893 this Court held in *United States* v. *Snyder,* 149 U.S. 210, that a tax lien was valid even against a bona fide purchaser for value who had neither knowledge nor notice of the lien. To alleviate the hardship of this situation, Congress amended the tax lien statute in 1913 to provide that the federal tax lien should not be valid as against any "mortgagee, purchaser, or judgment creditor" until notice of the lien had been filed. Act of March 4, 1913, c. 166, 37 Stat. 1016.[5] Similar protection in the absence of filed notice was extended to a subsequent "pledgee" by Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, 882.

In the Committee Reports accompanying the 1913 amendment, the categories of persons intended to be protected by that amendment were referred to variously as persons "proposing to buy the property of another," "intending purchasers," "incumbrancers," or a "person who has paid full value for the property." See H. Rep. No. 1018, 62d Cong., 2d Sess.; S. Rep. No. 1315, 62d Cong., 3d Sess. See also 49 Cong. Rec. 1802. The purpose of the amendment was stated

[4] Prior to 1913 the language of Revised Statutes, Section 3186, was as follows:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment-list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person."

[5] The pertinent language added by the 1913 amendment was as follows:

"* * * *Provided, however,* That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated * * *."

as being to protect such a person from "los[ing] his all by reason of this secret lien," as had been possible under *Snyder*. (S. Rep., *supra*, p. 2.) The description in the House Report of the reason for the amendment additionally states (p. 1):

> A person proposing to buy the property of another could protect himself against such a lien only by ascertaining from all the collectors in the United States whether or not the vendor was delinquent in the payment of taxes. This would be a great hardship and would make it practically impossible for any person proposing to buy property to secure himself against such liens. The same hardship would devolve upon mortgagees and judgment creditors. * * *

The clear purpose of Congress in enacting the predecessor to Section 6323(a) was therefore to afford protection to certain persons who equitably were thought to have a claim superior to the government's when the government fails to file notice of its lien. In particular, protection was given to persons who, subsequent to the federal lien, take formal steps to purchase or to obtain a secured interest in a taxpayer's property in reliance upon the apparent absence of any federal lien applicable to that property. Such persons might be seriously and unconscionably harmed by a "secret" federal lien, were it later to be held valid against them. Section 6323(a) thus focuses upon the fact that the creditor actually purchased, took a mortage or a pledge, or secured a judgment in justifiable ignorance of the lien.

Plainly the trustee in bankruptcy does not actually secure a judgment against the taxpayer. Equally plainly he does not come within the protective policy

which motivated Section 6323(a). If the trustee were to cut off the federal lien, the cut-off would take place on the date of bankruptcy. Yet there is no way in which the trustee's conduct would differ if the federal lien were filed shortly before, rather than shortly after, bankruptcy, nor can the trustee conceivably take any steps before or on the date of bankruptcy detrimental to the bankrupt estate because of his ignorance of a "secret" federal lien.[5a]

Confirmation of the inapplicability of Section 6323 (a) to the trustee is contained in the legislative history of the 1954 Code. In the course of the 1954 revision of the Code, the House version of the proposed Section 6323 contained a subsection (c) which would have made it explicit that "particular persons shall not be treated as judgment creditors because State or Federal law artificially provides or concedes such persons rights or privileges of judgment creditors, or even designates them as such, when they have not actually obtained a judgment in the conventional sense." H. Rep. No. 1337, 83d Cong., 2d Sess., p. A407 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4554–4555).[6] The House Committee made clear,

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[5a] In fact, as we show in Part B(1) of our Argument *infra*, the sole effect of holding the trustee to be a "judgment creditor" who automatically invalidates unfiled federal tax liens in bankruptcy would be to create a windfall in certain creditors who would not have prevailed over the federal lien had bankruptcy not occurred.

[6] The whole of the relevant passage states as follows (p. A407):

"Subsection (c) makes it clear that the protection of subsection (a) of this section is not extended to a mortgagee, pledgee, or purchaser who takes with notice or knowledge of the existence of the Federal lien; *and that such protection is not extended to a judgment creditor who does not have a valid*

through this subsection, its intention to codify "existing court decisions * * * which determine who is a mortgagee, pledgee, purchaser, or judgment creditor by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person." The 1954 Senate version of Section 6323 deleted subsection (c) of the House bill, for the reason that "your committee deems

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judgment obtained in a court of record and of competent jurisdiction or to a judgment creditor who does not have a lien which has been properly perfected under such a judgment. This subsection is not designed to extend the protection of subsection (a) of this section to categories of persons now denied protection by existing court decisions (under section 357(a) of the 1939 code) which determine who is a mortgagee, pledgee, purchaser, or judgment creditor by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person. Paragraph (1) of subsection (c) provides that the lien shall be valid, without the filing of notice thereof, as against any mortgagee, pledgee or purchaser, if such mortgagee, pledgee, or purchaser had notice or knowledge of the existence of the lien at the time the mortgage, pledge, or purchase, was made. A dual requirement is set forth in paragraphs (2) and (3) of this subsection which a judgment creditor must meet to be entitled to the protection of the notice provisions of subsection (a) of this section. One requirement is that the judgment creditor must have actually obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money; and the other requirement is that the judgment creditor, in the case of a valid judgment for the recovery of a certain sum of money, must have a perfected lien under such judgment on the property as to which the claims of the contesting parties relate. *Furthermore, subsection (c) makes clear that particular persons shall not be treated as judgment creditors because State or Federal law artificially provides or concedes such persons rights or privileges of judgment creditors, or even designates them as such, when they have not actually obtained a judgment in the conventional sense.*" (Emphasis added.)

it advisable to continue to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules." S. Rep. No. 1622, 83d Cong., 2d Sess., p. 575 (3 U.S.C. Cong. & Adm. News (1954) 4621, 5224). The Senate Committee further stated that "under existing law, a person who is *in fact* a mortgagee, pledgee, purchase[r], or judgment creditor will be entitled as such to the protection of this section" * * * (Emphasis added.)[1] In conference the House receded and agreed to the deletion of subsection (c) "thereby continuing in effect the existing law, including applicable rules which have been developed by judicial construction." H. Conference Rep. No. 2543, 83d Cong., 2d Sess., p. 78 (3 U.S.C. Cong. & Adm. News (1954) 5280, 5340). The language of the House Committee Report was car-

[1] S. Rep. No. 1622, *supra*, states in part, as follows (p. 575):

"This section corresponds to that of the House bill except for the deletion of subsection (c) of the House bill and conforming changes incident to such deletion.

"Subsection (c) of the House bill provided certain rules with respect to the validity of the tax lien, without the filing of notice thereof, as against mortgagees, pledgees, purchasers, or judgment creditors. The applicable rules have been developed under existing law by judicial construction, and your committee deems it advisable to continue to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules. The deletion of subsection (c) will continue in effect the existing law.

"This section corresponds to section 3672 of the 1939 Code. As under existing law, a person who is in fact a mortgagee, pledgee, purchase, [sic] or judgment creditor will be entitled as such to the protection of this section irrespective of the designation applied to such person under State law, for example, in a State which has adopted the Uniform Commercial Code and which uses other terms to describe such persons."

ried over into the Treasury Regulations. See Treasury Regulations Section 301.6323–1 (Appendix, *infra*).

The final relevant effect of this episode was to continue in effect the "existing law" as to the meaning of "judgment creditor". The "existing law" regarding that term was clearly the rule referred to in the decision in *United States* v. *Gilbert Associates, supra,* decided less than one year before the date of the House Committee Report, and which articulated the precise rule which the House proposed to codify. Hence, the latest expression of the Congressional purpose embodied in Section 6323(a) shows a continued intention to restrict the preference given by that section to purchasers, mortgagees, pledgees and judgment creditors "in the usual, conventional sense" who have an equitable claim to such a preference. As we have shown, the trustee in bankruptcy does not fall within either this limited language or the limited legislative purpose.

B. THE BANKRUPTCY ACT DOES NOT INVALIDATE PRIOR UNFILED PERFECTED FEDERAL TAX LIENS

Although, as we have shown above, Section 6323(a) thus does not, of its own force, automatically invalidate prior unrecorded federal tax liens through the act of bankruptcy, that result may, of course, be achieved by other federal statutes. The court of appeals held that Section 70c of the Bankruptcy Act was such a statute. The court relied upon the fact that Section 70c vests the trustee, as of the date of bankruptcy, "with all the rights, remedies, and powers of a creditor" then holding a lien upon the bankrupt's property by legal or equitable proceedings. The court

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reasoned that Section 70c thus gives the trustee the powers of a "judgment creditor" and that since, under Section 6323(a) of the 1954 Code, one of the "rights" of a "judgment creditor" is to invalidate a prior, unfiled federal tax lien, the trustee must also be vested with that right.

The verbal logic of the court of appeals' decision is unassailable. If, indeed, the concept of a "judgment creditor" is a fixed one throughout the United States Code, then the fact that Section 70c of the Bankruptcy Act gives the trustee "all" the "rights" of a creditor holding a lien by judicial or equitable proceedings, *i.e.*, a hypothetical judgment creditor, would inevitably lead to the conclusion that the trustee has the particular power to invalidate prior federal tax liens which Section 6323(a) of the Internal Revenue Code confers upon "judgment creditors." We submit, however, that the term "judgment creditor" is not invariably used in the various statutes to connote the identical concept. Specifically, we have shown above that, whatever a judgment creditor may connote in other contexts, for the purpose of Section 6323(a), "judgment creditor" refers only to a judgment creditor "in the usual, conventional sense" of one who has actually acquired a judgment against the taxpayer without notice through filing of the federal lien, and who thus has an equitable claim to priority over the lien. The term does not mechanically apply to all persons given the designation "judgment creditor" regardless of the realities. In *United States* v. *Gilbert Associates, supra*, itself, this Court held that a person was not a "judgment creditor" for purposes of Section 6323(a) although designated as such by state law.

This case, therefore, cannot be solved through verbal identities; the powers given under the Bankruptcy Act do not automatically include the power to invalidate federal tax liens merely because similar terminology is used in the two statutes.[7a] Since Section 6323(a) does not of its own force or for its own purposes make the trustee a "judgment creditor" entitled to a priority over prior federal liens, the relevant question upon which this case must turn is whether one can fairly find that purpose in Section 70c of the Bankruptcy Act. We submit one cannot, (1) because a construction of Section 70c invalidating all unrecorded federal tax liens in bankruptcy would be flatly inconsistent with Section 67b of the Bankruptcy Act and (2) because such a construction would create a windfall and an unjustifiable priority over federal tax liens in creditors with no equitable claim whatever to such a priority. In light of these considerations, we submit that it would be unwarranted to read Section 70c, which was not specifically addressed to or focused upon the problem of priorities over federal tax liens, as expanding the carefully restricted equitable priorities created by Section 6323(a) of the Revenue Code, the statute directly addressed to that problem.

At the outset, we note that Section 70c of the Bankruptcy Act came into the law in 1910. Act of June 25, 1910, c. 412, 36 Stat. 838. This was three years before the enactment of the predecessor to Section

[7a] In actuality, the Bankruptcy Act no longer even explicitly refers to the trustee as a hypothetical "judgment creditor." That terminology, used in the original predecessor to Section 70c (Act of June 25, 1910, c. 412, 36 Stat. 838) was eliminated by Section 2 of the Act of March 18, 1950, c. 70, 64 Stat. 24.

6323(a) of the Internal Revenue Code. It is therefore clear that, at the time Section 70c was drafted and enacted, Congress did not contemplate the effect now given that Section by the court of appeals, *i.e.*, that bankruptcy would invalidate prior unrecorded federal tax liens. In 1910, such liens, once perfected, could not be invalidated by any subsequent transferees. We do not suggest that this history is, of itself, fully dispositive of the present case. A general provision like Section 70c, giving the trustee "all" the rights and powers of a hypothetical judgment creditor, is, we agree, potentially susceptible of being applied so as to enlarge the trustee's powers as the powers of a judgment creditor expand through the subsequent enactment of other statutes. We have, however, already shown that the enactment of Section 6323(a), three years after the enactment of Section 70c, cannot be deemed as reflecting a congressional policy to expand the powers of a trustee in bankruptcy. We now show that such an automatic enlargement of the effect of bankruptcy through the enactment of Section 6323(a) would also be inconsistent with the fabric and purposes of the Bankruptcy Act.

1. If Section 70c is read to invalidate all prior unrecorded federal tax liens, it is flatly inconsistent with Section 67(b) of the Bankruptcy Act

The court of appeals' reading of Section 70c is squarely inconsistent with the explicit provisions of Section 67(b) of the Bankruptcy Act (Appendix, *infra*). The court of appeals held that Section 70c invalidates all prior unrecorded federal tax liens in bankruptcy. Section 67(b), however, specifically recognizes the potential *validity* of unrecorded federal

tax liens in bankruptcy. Section 67(b) first provides that statutory liens including "statutory liens for taxes * * * owing to the United States * * * may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him." It then provides that even where such tax liens (among the other statutory liens mentioned) "are required to be perfected and arise *but are not perfected before bankruptcy, they may nevertheless be valid,* if perfected within the time permitted by and in accordance with the requirements of such laws [creating the lien] * * *." (Emphasis added.) If a tax lien is perfected after bankruptcy, it would also be recorded after bankruptcy, yet Section 67(b) provides that such a lien "may nevertheless be valid" under certain circumstances. Thus, Section 67(b) in terms clearly contemplates what the court of appeals held impossible under Section 70c: the validity of unrecorded federal tax liens in bankruptcy.[8]

[8] Regarding the meaning of Section 67(b), *4 Collier on Bankruptcy* (14 ed., 1964 Rev.), Secs. 67.20, 67.26, pp. 183, 277–278, states in part as follows (p. 183):

"By statute in many states, mechanics, materialmen, landlords, and other classes are given liens upon the rendition of their services or the furnishing of other valuable consideration. Where the lien created by law is a perfected, as distinguished from an inchoate, lien, such lien remains valid. Where, as is often the case, the lien must be perfected by compliance with certain statutory formalities, such as filing of record, new subdivision *b* permits that to be done prior or subsequent to bankruptcy, but within the time permitted by the applicable lien statute, irrespective of the debtor's insolvency or bankruptcy. Similar provision is made in favor of the sovereign where a

Sections 70c and 67b are thus not reconcilable under the court of appeals decision. They are reconcilable, however, if Section 70c is read to invalidate state *contractual* and *judicial* liens in bankruptcy, when those liens would be invalid as to a judgment creditor, but not automatically to invalidate liens created and protected by *statute,* in light of the fact that the continued potential validity of *statutory* liens but not of *contractual* or *judicial* liens) is expressly recognized by Section 67b.

The foregoing reading of the two statutes is consistent with the function of Section 70c. Its predecessor was passed in 1910 (Act of June 25, 1910, c. 412, 36 Stat. 838, 840, Sec. 8) to correct a situation in which the trustee had no better right or title to the bankrupt's property than the bankrupt had had or which the bankrupt's existing creditors actually had acquired at the time the trustee's title vested. The case which precipitated the 1910 statute, *York Manufacturing Co.* v. *Cassell,* 201 U.S. 344, 352, involved an unrecorded state contractual lien which was held valid in bankruptcy even though a judgment creditor, if one had existed, could have invalidated the lien prior to bankruptcy. See also *Security Warehousing Co.* v. *Hand,* 206 U.S. 415. In reversing the result of the *York* case, Congress wished to give the trustee power to invalidate unrecorded state non-statutory liens even if an actual judgment creditor did not exist, so long as, were a judgment creditor to exist, he could have invalidated the lien. In light of the explicit recognition

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statute gives a lien for taxes, for debts in the nature of public accounts, or for other debts owing to the United States, a State, or subdivision thereof."

See also, *New York Brooklyn Fuel Corp.* v. *Fuller,* 11 F. 2d 802 (C.A. 2).

in Section 67b of the potential validity of unperfected *statutory* liens in bankruptcy, however, there is no basis for saying that Congress similarly intended bankruptcy automatically to invalidate unrecorded statutory liens. The most reasonable assumption is that the general provisions of the Bankruptcy Act were not meant to interfere with specific statutory policies governing the circumstances under which statutory liens may be invalidated. See 4 *Collier on Bankruptcy,* note 8, *supra.* This assumption should be especially strong when bankruptcy is sought to be used to invalidate a federal tax lien in the face of a federal statute (Section 6323(a) of the Internal Revenue Code) carefully delineating the narrow classes of persons equitably entitled to supercede a prior unrecorded federal lien.

2. If Section 70c is read to invalidate all prior unrecorded federal tax liens, it creates unjustifiable priorities over such liens in creditors with no equitable claim to preferred treatment

If the trustee in bankruptcy is to be considered a "judgment creditor" for purposes of Section 6323(a), the government's unfiled tax liens would be invalid as to all creditors of the bankrupt. This construction grants no additional protection to general creditors of the bankrupt, for the federal tax claim will still be paid ahead of general creditors as a fourth priority tax claim under Section 64 of the Bankruptcy Act. (See Appendix, *infra.*) Nor does it afford added protection to the four classes of creditors protected by Section 6323(a) of the Internal Revenue Code, for their claims are secured and superior to the federal lien by virtue of that section alone. On the other hand, this construction would create an anomaly, for its result

would be that bankruptcy would automatically set aside federal liens which, absent bankruptcy, could be avoided only by the four classes of creditors protected by Section 6323(a). Bankruptcy would thus create an unexpected windfall for creditors with inchoate liens, even if acquired after the federal lien was perfected, and for other subsequent secured creditors not protected by the notice requirement of Section 6323(a), so long as State law makes those liens superior to that of a judgment creditor.

In addition, as we show above, *supra,* under Section 67b of the Bankruptcy Act, state statutory liens may be perfected under state law after bankruptcy and thus be made valid against the trustee. If a federal tax lien were to be made wholly invalid because notice of the lien had not been filed before bankruptcy, whereas an unperfected subsequent State statutory lien may be perfected after bankruptcy, the result would be to invert the order of priorities which exist absent bankruptcy, a result which cannot conceivably be justified as within the policy of Section 70c. Moreover, the construction adopted by the court of appeals permits wholly unsecured claims for State and local taxes to share equally as fourth priority tax claims with the secured tax claims of the United States, despite the special protective purposes of the federal tax lien.

Bankruptcy Act proceedings are intended to protect the assets of the bankrupt for the benefit of his general creditors. To hold that the trustee can invalidate a perfected federal tax lien because notice has not been filed does not serve any useful purpose insofar

as these intended beneficiaries of the Act are concerned for as we have shown above, even if the federal tax lien is invalidated, the tax claim must still be paid ahead of the general creditors as a Section 64a priority claim. As to other special unsecured creditors whom Congress has seen fit to favor with Section 64a priority claims (*i.e.*, administrative expenses and wage claims), this group will also not benefit from the invalidation of the federal tax lien since, under Section 67c(1) of the Bankruptcy Act, payment of the federal lien, even if the lien is valid, is subordinated to these claims in the common situation where the tax lien attaches to personal property of which the government has not secured possession prior to bankruptcy. The sum result of the court of appeals decision, therefore, would be to favor unsecured state and local tax claims and secured creditors who take their security after the federal lien arises and who do not, absent bankruptcy, meet the requirements of Section 6323(a) for invalidating the federal lien. This result cannot be justified as a matter of equity or bankruptcy policy.

In sum, the trustee in bankruptcy meets none of the requirements of a "judgment creditor" under Section 6323(a) of the Internal Revenue Code, when that section is viewed alone. The fabric of the Bankruptcy Act is similarly inconsistent with the trustee's being considered a "judgment creditor" with the result that bankruptcy would automatically invalidate prior perfected, but unrecorded, federal tax liens. In these circumstances, a joint reading of the two statutes should not lead to a different result. The general

designation of the trustee as possessor of the rights of a hypothetical judgment creditor in Section 70c of the Bankruptcy Act, should not be held to supersede the carefully enacted policy of Section 6323(a) whereby perfected federal tax liens are valid, though unrecorded, against all but four narrow classes of subsequent creditors with strong equitable claims to priority over the federal lien.[9]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

PAUL BENDER,
Assistant to the Solicitor General.

I. HENRY KUTZ,
KARL SCHMEIDLER,
Attorneys.

MARCH 1965.

[9] Legislation repeatedly has been proposed in recent years explicitly to constitute the trustee in bankruptcy a "judgment creditor" with respect specifically to federal tax liens. See H.R. 7242, 86th Cong., 1st Sess., Sec. 6, which passed Congress in August 1960 (106 Cong. Record 17591), but was vetoed by the President on September 8, 1960 (106 Cong. Record 19168). The most recent bills have been H.R. 394, 88th Cong., 2d Sess., Sec. 6, and H.R. 136, 89th Cong., 1st Sess., Sec. 6. None of the bills have been enacted into law. The Committee Reports all underscore the view that only Congressional action can accomplish this result. For example, see H. Rep. No. 745, 86th Cong., 1st Sess., pp. 9–10, and S. Rep. No. 1871, 86th Cong., 2d Sess., pp. 10–11, on H.R. 7242; S. Rep. No. 1133, 88th Cong., 2d Sess., pp. 10–11, on H.R. 394.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under state or territorial laws.*—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) *With clerk of district court for District of Columbia.*—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(d) *Disclosure of Amount of Outstanding Lien.*—If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

(26 U.S.C. 6323.)

Bankruptcy Act, c. 541, 30 Stat. 544:

SEC. 64 [As amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 874, and Sec. 19(a), Act of July 7, 1952, c. 579, 66 Stat. 426]. DEBTS WHICH HAVE PRIORITY.—

a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the fees for the referees' salary fund and for the referees' expense fund; the filing fees paid by creditors in involuntary cases or by persons other than the bankrupts in voluntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt

by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge or in connection with the criminal prosecution of an offense punishable under chapter 9 of Title 18, or an offense concerning the business or property of the bankrupt punishable under other laws, Federal or State; the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow: *Provided, however,* That where an order is entered in a proceeding under any chapter of this title directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding if any; (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; and for the purposes of this clause, the term "traveling or city salesman" shall include all such salesmen, whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been re-

fused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under chapter 9 of Title 18, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: *Provided,* That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further,* That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: *Provided, however,* That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy.

SEC. 67 [As amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, and Sec. 21(c) and (d), Act of July 7, 1952, c. 579, 66 Stat. 420]. LIENS AND FRAUDULENT TRANSFERS.—* * *

* * * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the

United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court

c. Where not enforced by sale before the filing of a petition initiating a proceeding under this Act, and except where the estate of the bankrupt is solvent: (1) though valid against the trustee under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or any subdivision thereof, on personal property not accompanied by possession of such property, and liens, whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act; and (2) the provisions of subdivision b of this section to the contrary notwithstanding, statutory liens created or recognized by the laws of any State for debts owing to any person, including any State or any subdivision thereof, on personal property not accompanied by possession of, or by levy upon or by sequestration or distraint of, such property, shall not be valid against the trustee: *Provided, however,* That so much of clause (1) of this sub-

division c as restricts liens for wages and rent and clause (2) of this subdivision c shall not apply in proceedings under chapter X of this Act, unless an order shall be entered therein directing that bankruptcy be proceeded with, or in proceedings under section 77 of this Act. The court may on due notice order so much of any lien in excess of the restricted amount under clause (1) and any lien invalid under clause (2) of this subdivision c to be preserved for the benefit of the estate and, in any such event, such lien for the excess and such invalid lien, as the case may be, shall pass to the trustee.

* * * * *

(11 U.S.C. 107.)

SEC. 70 [As amended by Sec. 23 (a) and (e), Act of July 7, 1952, *supra*]. TITLE TO PROPERTY.

a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located * * *

* * * * *

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date

with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

* * * * *

(11 U.S.C. 110.)

Treasury Regulations on Procedure and Administration (1954 Code):

Sec. 301.6323–1 *Validity of lien against mortgagees, pledgees, purchasers, and judgment creditors.*

(a) *Invalidity of lien without notice*—(1) *Filing of notice.* The lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice of lien has been filed. * * *

* * * * *

(2) *Meaning of terms.* (i) As used in section 6323 and this section:

* * * * *

(b) The term "judgment creditor" means a person who has obtained a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money and, in the case of a judgment for the recovery of a certain sum of money, who has a perfected lien under such judgment on the property involved. The term "judgment" does not include an inchoate lien, such as an attachment lien, unless and until such lien has ripened into a judgment. United States v. Security Trust and Savings Bank (1950) 340 U.S. 47. Nor does the term "judgment" include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity, such as, for example, the action of State taxing authorities. United States v. Gilbert Associates (1953) 345 U.S. 361; and United States v. City of New Britain (1954) 347 U.S. 81.

(ii) The determination whether a person is a mortgagee, pledgee, purchaser, or judgment creditor, entitled to the protection of section 6323(a), shall be made by reference to the realities and the facts in a given case rather than to the technical form or terminology used to designate such person. Thus, a person who is in fact and in law a mortgagee, pledgee, or purchaser will be entitled as such to the protection of section 6323(a) even though such person is otherwise designated under the law of a State, such as the Uniform Commercial Code.

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JOHN F. DAVIS, CL[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. [redacted] 17

UNITED STATES OF AMERICA,

Petitioner,

vs.

RAY F. SPEERS,
Trustee in Bankruptcy of the Kurtz Roofing Company, etc.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RAY F. SPEERS, TRUSTEE IN BANKRUPTCY.

ROBERT B. GOEBLER,
SHUMAKER, LOOP & KENDRICK,
811 Madison Avenue,
Toledo, Ohio 43624,

FRANK BUCKINGHAM,
BUCKINGHAM, HOLZAFFEL & BUCKINGHAM,
231 W. Washington Row,
Sandusky, Ohio,

Attorneys for Respondent,
Ray F. Speers, Trustee.

(Counsel for Petitioner on inside of cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE, 621-0447

ARCHIBALD COX,
Solicitor General,
LOUIS F. CLAIBORNE,
Assistant Attorney General,
PAUL BENDER,
Assistant to the Solicitor General,
J. HARRY KATZ,
KARL SCHWARZLOSE,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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BRIEF FOR RAY F. SPEERS, TRUSTEE IN BANKRUPTCY.

OPINION ON THE COURT OF APPEALS.

The complete legal foundation for the judgment appealed from (R. 50) is found in the opinion (R. 44) of the Court of Appeals in this case, 335 F. 2d 311 (August 4, 1964), written by Judge O'Sullivan. There, all pertinent legal issues are considered in progression and found to require the conclusion that Congress has conferred upon trustees in bankruptcy the rights of a judgment creditor under 26 U. S. C. Section 6323(a).

After a short statement of the controlling facts and quotation from the statutes under consideration (Sec. 70c of the Bankruptcy Act, 11 U. S. C. Sec. 110(c) and Sec. 6321, Sec. 6323(a) of the Internal Revenue Code of 1954, 26 U. S. C. Sec. 6321, Sec. 6323(a)) the opinion stated this issue:

> "The question before us, then, is whether the words 'a creditor then holding a lien' upon the bankrupt's assets 'by legal * * * proceedings' describe among other things, a judgment creditor. If so, the bankruptcy trustee, under § 70, sub c, has all the rights of such judgment creditor * * *." (p. 312.)

In response, the court concluded (1) that by the 1950 and 1952 amendments, "Congress intended to strengthen, not weaken, the trustee's rights against all forms of secret liens"; (pp. 312-313, R. 46), (2) that Section 70(c) confers on the trustee not *some*, but *all* of the rights of a creditor holding a lien arising from judicial proceedings (p. 313, R. 47); (3) that this Court's decision in *United States v. Gilbert Associates, Inc.*, 345 U. S. 361, 364 (1953) was not contrary to this conclusion (p. 314, R. 48) inasmuch as it involved a conflict between federal statute and state decisional law rather than resolution of the relationship between carefully drawn federal statutes.

The court's ultimate conclusion was stated by quoting from the concurring opinion in the Ninth Circuit case[1] that "In my view this statute, (Section 70(c)) states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one."

This opinion is reprinted on pages 44-49 of the transcript of record. It contains complete answers to petitioner's contentions.

QUESTION PRESENTED.

Does the grant, by federal statute, to a trustee in bankruptcy of "all the rights * * * of a creditor * * * holding a lien" "by legal * * * proceedings" include the rights extended by federal law to a "judgment creditor"?

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[1] Judge Hamley's statement in the case of *Simonson v. Granquist*, 287 F. 2d 489, 491 (9 Cir. 1961), reversed on other grounds, 369 U. S. 38 (1962).

STATUTES AND REGULATIONS INVOLVED.

Only three statutes are involved in this case. The first is Section 70c of the Bankruptcy Act[2] (App. p. 15), which confers upon trustees in bankruptcy the rights of a judgment lien creditor.

The others are Sections 6321 and 6323 of the Internal Revenue Code of 1954[3] (App. pp. 15, 16). The first creates a lien for taxes on neglect or refusal to pay after demand, and the next provides that such lien shall be invalid against a "judgment creditor until notice thereof has been filed * * *."

These statutes are printed in the appendix to petitioner's brief and for convenience are also printed at pages 15 to 17 in the appendix to this brief.

STATEMENT OF THE CASE.

The controlling facts are uncomplicated and uncontradicted. On June 3, 1960, federal taxes were assessed against The Kurtz Roofing Company but were not paid. (R. 12, 30, 32.) No notice of this tax assessment was filed as required by Section 6323 of the Internal Revenue Code of 1954. (R. 12, 30, 32.)

On June 20, 1960, the company filed a voluntary petition in bankruptcy and adjudication was entered as a matter of course. (R. 2, 31.)

All of the property with respect to which the United States claims a lien was personal property located in Erie County, Ohio in the possession of the bankrupt prior to bankruptcy and of the bankruptcy court and its trustee thereafter. (R. 31.)

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[2] 11 U. S. C. Sec. 110(c).

[3] 26 U. S. C. Sec. 6321 and Sec. 6323.

Subsequently, administration of the bankrupt estate was completed and notice of final meeting with proposed distribution was given to creditors. (R. 8.) The dividend for tax claims was 53.48%. This amounted to $9,202.35 for the District Director of Internal Revenue and $1,925.26 for state and local taxing authorities. (R. 10.) The government objected and filed an answer asserting statutory tax liens. (R. 10.) After notice, hearing was held on this answer (R. 13-26), and on June 12, 1962, the referee entered an order denying the government's claim of lien priority. (R. 11.)

This order was reviewed by the District Court and, on March 20, 1963, it was confirmed. (R. 42.)

The Sixth Circuit Court of Appeals affirmed, 335 F. 2d 311 (R. 44), and its order (R. 50) is now before this Court on certiorari.

The failure, *prior to bankruptcy*, to file notice as called for by Section 6323(a) of the Internal Revenue Code of 1954 creates the issue and question on this appeal. The trustee claims the rights of a "judgment creditor," and contends that without the timely filing of notice the government tax lien is subordinate to the trustee's rights as a judgment lien creditor granted by Section 70c of the Bankruptcy Act. The referee, the District Court and the Sixth Circuit Court of Appeals have all agreed with this contention. (R. 11, 28, 50.)

The government contends that despite the secret nature of the tax lien before notice is filed, a bankruptcy trustee does not have *all* the rights of a "judgment creditor" and that this secret lien is not invalid as to him. It admits that a trustee has been granted *some* of the rights of a

judgment creditor but rejects the statutory recitation that he is vested with "all" such rights.[4]

It admits that the "verbal logic of the Court of Appeals' decision is unassailable," [5] but refuses to accept it.

SUMMARY OF ARGUMENT.

The grant by federal statute to a trustee in bankruptcy of "all the rights * * * of a creditor * * * holding a lien" "by legal * * * proceedings" includes the rights extended by federal law to a "judgment creditor."

A. The case of *United States v. Gilbert Associates, Inc.*, 345 U. S. 361, 364 (1953) is not relevant nor controlling in this case.

B. The history and purpose of Section 70c of the Bankruptcy Act evidence clear legislative intent that bankruptcy trustees have all the rights of a judgment creditor.

C. Section 70c is unambiguous and its terms include grant of rights of judgment creditor.

D. Section 67b of the Bankruptcy Act, 11 U. S. C. Section 107(b), does not detract from trustee's status as judgment creditor "at the date of bankruptcy."

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[4] Court of Appeals opinion 335 F. 2d 311, 313, R. 47.

[5] Petitioner's brief, p. 14.

ARGUMENT.

A. The case of *United States v. Gilbert Associates, Inc.*, 345 U. S. 361, 364 (1953) is Not Relevant Nor Controlling in This Case.

Keystone of the government's argument and of the decisions of the Second, Third and Ninth Circuits[6] which accepted the government's line of reasoning is the following sentence taken from *United States v. Gilbert Associates, Inc., supra*: "In this instance, we think Congress used the words 'judgment creditor' in § 3672 (now § 6323) in the usual, conventional sense of a judgment of a court of record, since all states have such courts."

As stated by the Court of Appeals,[7] this holding does not require acceptance of the government's contention. First, the construction of Section 70c was not in issue, and, second, the factual basis for decision was much different.

The enactment of the Bankruptcy Act is based on broad and very general grant of constitutional authority.[8] Under this, bankruptcy trustees have been granted the status and authority necessary for equitable distribution of assets among creditors. Section 70 of the Bankruptcy Act states three such grants: (a) title to all of the bankrupt's property; (b) the right to reject burdensome property and contracts; and (c) the status of a judgment lien creditor. The propriety of each of these grants has been acknowledged (4 *Collier on Bankruptcy*, 948, 1347, 1413, Secs.

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[6] *Brust v. Sturr*, 237 F. 2d 135 (2 Cir. 1956); *In re Fidelity Tube Corp.*, 278 F. 2d 776 (3 Cir. 1960); cert. denied 364 U. S. 828 (1960); *United States v. England*, 226 F. 2d 205 (9 Cir. 1955); *Simonson v. Granquist*, 287 F. 2d 489 (9 Cir. 1961); reversed on other grounds, 369 U. S. 38 (1962).

[7] 335 F. 2d 311, 314, R. 48.

[8] Article I, Section 8, Clause 4, United States Constitution grants legislative power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

70.04, 70.43, 70.49); and there is nothing in the *Gilbert Associates, Inc., supra,* opinion or judgment which considers or limits the effect of Section 70.

Gilbert Associates, Inc., supra, is subject to factual distinction also. There, the claim of "judgment creditor" was based on state court decisions that the assessment of a tax is "*in the nature* of a judgment * * *."[9] In the present case, the trustee's claim of "judgment creditor" arises from federal statutory pronouncement that he "shall be deemed vested * * * with all the rights * * * of a creditor * * * holding a lien" "by legal or equitable proceedings * * *."

The Court of Appeals concluded that the *Gilbert Associates, Inc.* case, *supra,* was "inapposite to the question" in this case.[10] We believe this was a correct conclusion.

B. The History and Purpose of Section 70c of the Bankruptcy Act Evidence Clear Legislative Intent that Bankruptcy Trustees have All the Rights of a Judgment Creditor.

Under court decisions prior to 1910, unrecorded and secret liens prevented equitable administration of bankrupt estates. In that year, by amendment of Section 47 of the Bankruptcy Act,[11] Congress granted to trustees in bankruptcy, "all the rights, remedies and powers of a judgment creditor then holding an execution duly returned unsatisfied." The acknowledged purpose of this amendment was to correct the evil of secret liens. *Sampsel v. Straub,*

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[9] *United States v. Gilbert Associates, Inc., supra,* 363.

[10] 335 F. 2d 311, 314, R. 48.

[11] 11 U. S. C. Sec. 75.

et al., 194 F. 2d 228, 231 (9 Cir. 1951); cert. denied 343 U. S. 927 (1952).

Three years later, in 1913, and with the same purpose, Congress adopted the express prohibition of Section 6323. "Congress enacted Section 3672 (now Section 6323) to meet the harsh condition created by the holding in *United States v. Snyder*, 149 U. S. 210, * * * that a secret federal tax lien was good against a purchaser for value without notice." *United States v. Gilbert Associates, Inc., supra*, 363-364.

In 1952, Section 70c was amended to direct that "the trustee * * * at the date of bankruptcy, shall be deemed vested * * * with all the rights, remedies and powers of a creditor then holding a lien" "by legal or equitable proceedings." [12]

Congressional statements both before and after this amendment indicate the intention that a bankruptcy trustee should have the rights of a judgment creditor. Senate Report No. 72, House Report No. 1293 (S. 88), U. S. Code Cong. Serv., 81st Cong., 2nd Sess. (1950) 1985, 1986; 96 *Cong. Record* 1529, 1532 (1950);[13] *Hearing Before Sub-*

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[12] 66 Stat. 430 (1952).

[13] Senate Report No. 72 (House Report No. 1293), *supra*, makes the judgment lien creditor status of the trustee in bankruptcy clear with these words at pages 1985-1986:

> "(b) Section 2 of the bill amends section 70c of the Bankruptcy Act, dealing with the general rights of a trustee in bankruptcy, and is essentially correlative to the amendment to section 60a, effected by section 1 of the bill. Under existing law, a trustee as to all property in the possession or under the control of the bankrupt, at the date of bankruptcy, is deemed vested, as of the date of bankruptcy, with all of the rights of a creditor then holding a lien by legal or equitable proceedings, and, as to all other property, with the rights of a *judgment creditor* then holding an unsatisfied execution.

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committee No. 2 of the Committee on the Judiciary, House of Representatives, 81st Cong., 1st Sess. on H. R. 272 and H. R. 2691, March 14, 16 and 18, 1949, Serial No. 7, pp. 8, 11-12, 49, 61, 138; *Hearings Before Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary, House of Representatives,* 80th Cong., 2nd Sess., H. R. 2412 and H. R. 5834, May 7, 1948, Serial No. 19, pp. 9, 10, 14, 17, 47, 49, 63, 65, 148.

The first cited of these reports, which is quoted at length in the footnote, contained the statement that "A trustee in bankruptcy occupies the position of a 'universal' judgment or lien creditor * * *."

Subcommittee Chairman Hobbs confirmed this on the floor of the House of Representatives stating: "The trustee in bankruptcy is removed from the position of a bona fide purchaser for value without notice and given an adjudicated lien as a judgment creditor. I think that that is a fair statement of the act." "All that a trustee needs is a judgment from a court of competent jurisdiction giving him his lien * * * and that is what this bill does." 96 *Cong. Record* 1532, *supra.*

(Continued from preceding page)

"In view of the amendment made to section 60a, as well as intrinsically, it is deemed wise to place the trustee in bankruptcy in the position of a lien creditor with respect to all of the bankrupt's property, and section 2 of the bill so amends section 70c.

* * * * *

"Traditionally, it is the primary office of the Bankruptcy Act to protect creditors, both secured and unsecured; to marshal the bankrupt's assets; and to distribute them among his creditors equitably and ratably, in accordance with their respective rights and interests.

"It follows from these broad general principles, as well as from the basic provisions of the Bankruptcy Act itself that—

"(A) A trustee in bankruptcy occupies the position of a 'universal' judgment or lien creditor, with all such a creditor's remedies (Bankruptcy Act, sec. 70); * * *"

As to statements since the 1952 amendment, we believe that the government misconstrues Congressional Committee Reports subsequent to the decision in *In re Fidelity Tube Corp., supra.* Senate Report No. 1133, 88th Congress, 2nd Sess. (p. 11) and House Report No. 454, 88th Congress, 1st Sess. (p. 10) both express the opinion that the decisions of the Courts of Appeals of the Second, Third and Ninth Circuits "appear to be contrary to the legislative purpose which gave to the trustee all the rights of an ideal judicial lien creditor." [14]

The Court of Appeals recognized this legislative intent and purpose, and we believe that this was correct.

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[14] Senate Report No. 1133, *supra*, at page 11, said:

"The effect of these decisions is that the Federal Government's unrecorded tax lien prevails over the rights of the trustee under section 70c. *This would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial lien creditor.* Prior to 1950, the trustee was given the status of a judicial lien creditor as to all property coming into the possession of the bankruptcy court. As to all other property, he was given the rights of a judgment creditor holding an execution returned unsatisfied. In 1950, the distinction which turned on possession was eliminated and the trustee was simply given the rights of a judicial lien creditor. The House report which accompanied the bill indicates that the purpose of Congress was not to contract but rather to expand the rights of the trustee under section 70c. The report states that the amendment to section 70c—'has been placed in the bill for the protection of trustees in bankruptcy as correlative to the amendment to section 60, and also to simplify, and to some extent *expand, the general expression of the rights of trustees in bankruptcy* (H. Rept. 1293, 81st Cong., 2d sess., p. 7 (1949)).'

"As a matter of general law, the holder of a lien by legal proceedings has greater rights than a judgment creditor who usually has no rights in the personal property of the debtor by virtue of his judgment. Even as to real property it is frequently necessary for the judgment creditor to take further action after judgment to create a lien. It would seem anomalous to allow judgment creditors to prevail over secret tax liens and to deny that right to a judicial lien holder. As against liens and transfers other than Federal tax liens, it has generally been held that a trustee in bankruptcy does

(Continued on following page)

C. Section 70c is Unambiguous and Its Terms Include Grant of Rights of Judgment Creditor.

Considering its terms objectively, the construction of Section 70c presents neither ambiguity nor difficulty. Its language is the "dependable guide" to its meaning. *Simonson, Trustee v. Granquist, District Director,* 369 U. S. 38, 40 (1962). "First reference is * * * to the literal meaning of the word employed" [*Flora v. United States,* 357 U. S. 63, 65 (1958)], and statutes are to be applied "on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Ry. Co.,* 343 U. S. 562, 575 (1952). Plain words even obviate the need for reference to legislative history. *Ex parte Collett,* 337 U. S. 55, 61 (1949).

Section 70c says that these rights "*shall be deemed vested*" in a bankruptcy trustee. This terminology is mandatory [*Escoe v. Zerbst, Warden,* 295 U. S. 490, 494

(Continued from preceding page)

have the rights of a judgment creditor. See, e.g., *McKay v. Trusco Finance Co.* (198 F. 2d 431 (5th Cir. 1952)); *Sampsell v. Straub* (194 F. 2d 228 (9th Cir. 1951)); cert. denied, 343 U. S. 927 (1952).

"The need for forthright congressional action in this matter was underscored by the decision in *Fidelity Tube,* supra. There the court pointed to the fact that legislation clarifying the status of the judgment creditor was pending before Congress and further declared that it considered the enactment of such legislation necessary if the trustee was to have the status of a judgment creditor vis-a-vis the Federal tax lien.

"In order to assure the trustee of this status, section 6 of H. R. 394, as reported, specifically provides that a trustee shall have the rights and powers of 'a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists.' " (Emphasis added.)

House Report No. 454, *supra,* at page 10 also said:

"that the effect of *In re Fidelity Tube Corp., supra,* would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial lien creditor."

(1935)] and creates "a conclusive presumption." *Kohn v. Myers,* 266 F. 2d 353, 357 (2 Cir. 1950). "Vested," of course, is defined as being "so fixed as to be no longer subject to determination or forfeit."

That the contested clause includes the status of judgment creditor appears from related Sections 60a(1) and 67a(1) of the Bankruptcy Act.[15] The first of these sections recites this definition: "A lien obtainable by legal or equitable proceedings upon a simple contract within the meaning of paragraph (2) is a lien arising in ordinary course of such proceedings upon the entry or docketing of a judgment or decree, * * *."

The second equates judgments with "legal or equitable * * * proceedings" in these words: "Every lien against the property of a person obtained by attachment, judgment, levy, or *other* legal or equitable process or proceedings * * *" (Emphasis added.)

And, in the case of *Myers, Trustee v. Matley,* 318 U. S. 622, 627 (1943), this Court looked upon a bankruptcy trustee as an "execution creditor." At page 627, it said:

> "Historically, and under the theory of the present Act, bankruptcy has the force and effect of the levy of an execution for the benefit of creditors to insure an equitable distribution amongst them of the bankrupt's assets. The trustee is vested not only with the title of the bankrupt but clothed with the right of an execution creditor with a levy on the property which passes into the trustee's custody."

We believe that Judge O'Sullivan of the Sixth Circuit and Judge Hamley of the Ninth Circuit have stated the proper conclusion, "as clearly as words can speak * * * a trustee is to be treated *as if* he were a judgment creditor * * *."[16]

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[15] 11 U. S. C. Secs. 96(a)(4), 107(a)(1).

[16] 335 F. 2d 311, 314, R. 49; *Simonson v. Granquist, supra.*

D. Section 67b of the Bankruptcy Act, 11 U. S. C. Section 107(b), Does Not Detract from Trustee's Status as Judgment Creditor "at the date of bankruptcy."

Departing completely from the record and disregarding the findings of fact on which this appeal is based (R. 49, 32), the government contends that the filing (7½ months after bankruptcy) of notice of its tax lien in Erie County, Ohio where bankrupt had been in business defeated trustee's position as a judgment creditor at the date of bankruptcy. Two facts are determinative. First, all property with respect to which the government claims a tax lien was personal property in possession of the bankrupt and later the trustee but never in possession of the government. (R. 31.) Consequently, under Section 67c of the Bankruptcy Act,[17] the lien for taxes must be subordinated to bankruptcy claims.

In addition, the trustee's position as a creditor under Section 70c of the Bankruptcy Act[18] is operative as of the date of bankruptcy. *Lewis, Trustee v. Manufacturers National Bank of Detroit*, 364 U. S. 603, 607 (1961). In this case, after reviewing the history of Section 70c, this Court said:

> "We think that one consistent theory underlies the several versions of § 70c which we have set forth, *viz.*, that the rights of creditors—whether they are existing or hypothetical—to which the trustee succeeds are to be ascertained as of 'the date of bank-

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[17] 11 U. S. C. Section 107(c) which provides: "c. Where not enforced by sale before the filing of a petition initiating a proceeding under this Act, and except where the estate of the bankrupt is solvent: (1) though valid against the trustee under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States * * *, on personal property not accompanied by possession of such property, * * * shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act * * *."

[18] 11 U. S. C. Section 110(c).

> ruptcy,' not at an anterior point of time. That is to say, the trustee acquires the status of a creditor as of the time when the petition in bankruptcy is filed. We read the statutory words 'the rights * * * of a creditor [existing or hypothetical] then holding a lien' to refer to that date."

Under either of these authorities, the priority of the government's late-filed lien is subordinated to the interest of the trustee. (R. 8-10.)

CONCLUSION.

All legislative and statutory signposts point to the conclusion that bankruptcy trustees are to be accorded all of the rights of a judgment creditor or lien holder as of the date of bankruptcy.

Since the 1952 amendment of Section 70c which used the words "of a creditor holding a lien" "by legal * * * proceedings at the date of bankruptcy * * *," three Courts of Appeals have denied that "judgment creditor" is included within the expansive terms used. Finally, in this case, the Court of Appeals for the Sixth Circuit acknowledged and stated this obvious conclusion. The government acknowledges that the "logic of the court of appeals' decision is unassailable." We agree and urge that the decision and judgment of that court be affirmed.

Respectfully submitted,

ROBERT B. GOSLINE,
SHUMAKER, LOOP & KENDRICK,
811 Madison Avenue,
Toledo, Ohio 43624,

FRANK BUCKINGHAM,
BUCKINGHAM, HOLZAPFEL & BUCKINGHAM,
231 W. Washington Row,
Sandusky, Ohio,

Attorneys for Respondent,
Ray F. Speers, Trustee.

APPENDIX.

Bankruptcy Act.

Sec. 70

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

(11 U. S. C. 110(c))

Internal Revenue Code of 1954.

§ 6321. *Lien for taxes*

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights of property, whether real or personal, belonging to such person. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 779.

(26 U. S. C. 6321)

§ 6323. *Validity against mortgagees, pledgees, purchasers, and judgment creditors*

(a) Invalidity of lien without notice.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) Under state or territorial laws.—In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With clerk of district court.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) With clerk of district court for District of Columbia.—In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) Form of notice.—If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) Exception in case of securities.—

(1) Exception.—Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph

(2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) Definition of security.—As used in this subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) Disclosure of amount of outstanding lien.—If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed. August 16, 1954, 9:45 a.m., E. D. T., c. 736, 68A Stat. 779.

(26 U. S. C. 6323)

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1965.

United States, Petitioner, *v.* Ray F. Speers, Trustee in Bankruptcy of the Kurtz Roofing Company, etc.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December 13, 1965.]

Mr. Justice Fortas delivered the opinion of the Court.

This case presents the question whether a federal tax lien, unrecorded as of the time of bankruptcy, is valid as against the trustee in bankruptcy.

On June 3, 1960, a District Director of Internal Revenue assessed more than $14,000 in withholding taxes and interest against the Kurtz Roofing Company. Demand for payment was made, and the taxpayer refused to pay. This gave rise to a federal tax lien.[1] Notice of the lien was not filed either in the Office of the Recorder of Erie County, Ohio, where Kurtz had its principal place of business, or in the United States District Court, at least not before February of 1961.[2] On June 20, 1960, Kurtz

[1] 26 U. S. C. § 6321 (1964 ed.) provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

26 U. S. C. § 6322 (1964 ed.) provides: "Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

[2] In its brief in the Court of Appeals the Government for the first time stated that notice of the lien was in fact filed with the Recorder

filed a petition in bankruptcy. In the ensuing proceedings the trustee took the position that the federal tax lien was invalid as to him. He relied upon § 70c of the Bankruptcy Act, 11 U. S. C. § 110 (c) (1964 ed.), which, he asserted, vested in him the rights of a "judgment creditor," and upon 26 U. S. C. § 6323 (1964 ed.), which entitles a "judgment creditor" to prevail over an unrecorded federal tax lien. Section 70c provides in part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Section 6323 provides in part:

> "[T]he lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate . . . ."

The trustee's position, in short, was that his statutory lien attached to all property of the bankrupt as of the date of filing of the petition; that he was a statutory "judgment creditor"; and that, under § 6323, the unrecorded tax lien of the United States was not valid against him. This position, if sustained, would reduce the Government's claim for unpaid taxes to the status of an unsecured claim, sharing fourth-class priority with unsecured state and local tax claims under § 64a (4) of the Bank-

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on February 9, 1961. The statement in the Referee's certificate that notice of the lien was never filed was not controverted in the District Court and, as respondent contends, there is no proof of the February filing in the record.

ruptcy Act, 11 U. S. C. § 104 (a)(4) (1964 ed.), and ranking behind administrative expenses, certain wage claims, and specified creditors' expenses.[3] The result in the present case is that instead of recovering the full amount owing to it, the United States would receive only 53.48%

The trustee's position was affirmed by the referee, the District Court, and the Court of Appeals for the Sixth Circuit. 335 F. 2d 311. Certiorari was granted, 379 U. S. 958, to resolve the conceded conflict between decisions of Courts of Appeals for the Second, Third, and Ninth Circuits[4] and the decision below. We affirm.

Despite the language of the applicable statutory provisions, § 70c and § 6323, most of the Courts of Appeals passing on the question have sustained the validity of an unrecorded federal tax lien as against the trustee in bankruptcy. They have arrived at this result on the authority of a statement in *United States* v. *Gilbert Associates, Inc.*, 345 U. S. 361, 364, that the phrase "judgment creditor" in § 3672, the predecessor of § 6323,

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[3] See §§ 64a (1)–(3), 11 U. S. C. §§ 104 (a)(1)–(3) (1964 ed.). Secured creditors, including those whose security was obtained subsequent to creation of the Government's lien, would have recourse to their security before any of the Bankruptcy Act priorities come into play. *Coggin* v. *California Labor Div.*, 336 U. S. 118; *City of Richmond* v. *Bird*, 249 U. S. 174. Administrative expenses and wage claims precede all other statutory liens on personal property not accompanied by possession if not enforced by sale prior to bankruptcy. § 67c, 11 U. S. C. § 107 (c) (1964 ed.); *Coggin, supra*, 126–130.

[4] See *Brust* v. *Sturr*, 237 F. 2d 135 (C. A. 2d Cir.); *In re Fidelity Tube Corp.*, 278 F. 2d 776 (C. A. 3d Cir.) (Kalodner and Hastie, JJ., dissenting), cert. denied *sub nom. Borough of East Newark* v. *United States*, 364 U. S. 828; *Simonson* v. *Granquist*, 287 F. 2d 489 (C. A. 9th Cir.) (Hamley, J., expressing contrary views), rev'd on other grounds, 369 U. S. 38. See also *United States* v. *England*, 226 F. 2d 205 (C. A. 9th Cir.); *In re Taylorcraft Aviation Corp.*, 168 F. 2d 808, 810 (C. A. 6th Cir.) (dictum).

was used by Congress "in the usual, conventional sense of a judgment of a court of record . . . ."

It is clear, however, that this characterization was not intended to exclude a trustee in bankruptcy from the scope of the phrase "judgment creditor." The issue before the Court in *Gilbert* was quite different.

Gilbert involved neither a bankruptcy proceeding nor the rights of a trustee in bankruptcy. *Gilbert* arose out of a state insolvency proceeding. The issue was whether an unrecorded federal tax lien was valid as against a municipal tax assessment which had neither been reduced to judgment nor accorded "judgment creditor" status by any statute. The asserted superior position of the local tax claim was based upon the fact that the New Hampshire court, in the *Gilbert* insolvency proceeding, had, for the first time, conveniently characterized the local tax claim as "in the nature of a judgment," relying upon the procedures used by the taxing authorities.[5] Because the effect of federal tax liens should not be determined by the diverse rules of the various States, the Court held that the municipality was not a "judgment creditor" for purposes of the federal statute. The Court said:

> "A cardinal principal of Congress in its tax scheme is uniformity, as far as may be. Therefore, a 'judgment creditor' should have the same application in all the states. In this instance, we think Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record, since all states have such courts. We do not think Congress had in mind the action of taxing authorities who may be acting judicially as in New Hampshire and some other states, where the end result is something 'in the nature of a judgment,'

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[5] 345 U. S., at 363, quoting from *Petition of Gilbert Associates, Inc.*, 97 N. H. 411, 414, 90 A. 2d 499, 502.

while in other states the taxing authorities act quasi-judicially and are considered administrative bodies." (Footnotes omitted.) 345 U. S., at 364.[6]

In view of the nature of the claim for which superiority was asserted and because its dominant theme was the need for uniformity in construing the meaning of § 3672, *Gilbert* cannot be considered as governing the entirely different situation with respect to the rights conferred by Congress upon a trustee in bankruptcy. In the latter circumstance we are confronted with a specific congressional Act defining the status of the trustee. We have no problem of evaluating widely differing state laws. We have no possibility of unequal application of the federal tax laws, depending upon variances in the terms and phraseology of different state and local tax assessment statutes and judicial rulings thereon. Here we are faced with a uniform federal scheme—the rights of the trustee in bankruptcy in light of an unequivocal statement by Congress that he shall have "all" the rights of a judicial lien creditor with respect to the bankrupt's property.

The legislative history lends support to the conclusion drawn from the statutory language that the purpose of Congress was to invalidate an unrecorded federal tax

[6] The Government's brief also emphasized this concern for uniformity in administration of the federal tax laws. See brief for petitioner in *Gilbert*, No. 440, 1952 Term, pp. 22–24, where the Government argued: "Congress did not intend to subordinate federal tax liens to local tax liens merely because by state statute or state court decisions the local tax assessments are for local purposes denominated 'judgments'. . . . Moreover, in holding that under our 'decisions' and in 'this jurisdiction' the Town's tax assessments are 'judgments,' the court below failed to give sufficient heed to the repeated declarations of this Court that the federal revenue laws should be interpreted 'so as to give a uniform application to a nation-wide scheme of taxation,' and hence their provisions are not to be deemed subject to state law unless the language of the section involved, expressly or by necessary implication, so requires."

lien as against the trustee in bankruptcy. It was in 1910 that Congress enacted § 70c, vesting the trustee "with all the rights, remedies, and powers of a judgment creditor." [7] Three years later, in 1913, Congress enacted the predecessor of § 6323, providing that an unrecorded federal tax lien was invalid as against a "judgment creditor." [8] These two statutes, with their corresponding references to "judgment creditor," co-existed for nearly 40 years. During that period, and prior to our decision in *Gilbert* in 1953, the only Court of Appeals squarely to pass upon the question decided that the trustee was a "judgment creditor" for purposes of avoiding an unrecorded federal tax lien. *United States* v. *Sands,* 174 F. 2d 384, 385 (C. A. 2d Cir.), rejecting contrary dictum in *In re Taylorcraft Aviation Corp.,* 168 F. 2d 808, 810 (C. A. 6th Cir.).

In amending the Bankruptcy Act in 1950, Congress deleted from § 70c the phrase "judgment creditor," providing instead that whether or not the bankrupt's property was in possession or control of the court, the trustee was to have "all the rights, remedies, and powers" of a creditor holding a judicial lien.[9] Elsewhere in the same

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[7] The Act of June 25, 1910, c. 412, 36 Stat. 838, 840, § 8, provided in part: "such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

[8] Act of March 4, 1913, c. 166, 37 Stat. 1016.

[9] Act of March 18, 1950, c. 70, 64 Stat. 24, 26, now 11 U. S. C. § 70c. Prior to the amendment, § 70c characterized the trustee as a lien holder as to property in the court's possession or control and as a "judgment creditor" as to property not so reduced to possession. See n. 7, *supra; Lewis* v. *Manufacturers National Bank,* 364 U. S. 603, 605–606.

legislation it was recognized that the category of those holding judicial liens includes judgment creditors,[10] and a judicial lien holder generally has "greater rights than a judgment creditor." [11] It is clear, therefore, that, with respect to the present problem, it was not the purpose of the 1950 amendments to reduce the powers of the trustee. As the House report accompanying the legislation noted, the revision of § 70c "has been placed in the bill for the protection of trustees in bankruptcy . . . also to simplify, and to some extent expand, the general expression of the rights of trustees in bankruptcy." [12]

In 1954 Congress dealt explicitly with the question whether the trustee ought to prevail against unrecorded federal tax liens. An unsuccessful effort was made, reflected in the House version of the proposed § 6323, expressly to exclude "artificial" judgment creditors like the trustee in bankruptcy.[13] At conference, the House

[10] Act of March 18, 1950, c. 60, 64 Stat. 24, 25, now 11 U. S. C. § 96 (a)(4). See 4 Collier, Bankruptcy, ¶ 70.49, n. 3, at 1415 (1962 ed.).

[11] See, *e. g.*, H. R. Rep. No. 745, 86th Cong., 1st Sess., to accompany H. R. 7242, p. 10: "As a matter of general law the holder of a lien by legal proceedings has greater rights than a judgment creditor . . . . It would seem anomalous to allow judgment creditors to prevail over secret tax liens and to deny that right to a judicial lien holder."

[12] H. R. Rep. No. 1293, 81st Cong., 1st Sess., to accompany S. 88, p. 7. That this was the tenor of the amendments is generally conceded. See, *e. g.*, *In re Fidelity Tube Corp.*, 278 F. 2d, at 781, 786–787 (both majority and dissenting opinions); 4 Collier, *op. cit. supra*, at 1415; Seligson, Creditors' Rights, 32 N. Y. U. L. Rev. 708, 710 (1957).

[13] The proposed legislation was to make clear that "such protection is not extended to a judgment creditor who does not have a valid judgment obtained in a court of record and of competent jurisdiction" and that "particular persons shall not be treated as judgment creditors because State or Federal law artificially provides or concedes such persons rights or privileges of judgment creditors, or even designates them as such, when they have not actually ob-

conferees acceded to the views of the Senate, which deemed it "advisable to rely upon judicial interpretation of existing law instead of attempting to prescribe specific statutory rules."[14] The Government suggests that the "existing law" sought to be preserved was this Court's decision in *Gilbert*. But as of the date of the 1954 amendments, *Gilbert* had not yet been applied by any court to displace the rights of the trustee in bankruptcy as against an unrecorded federal tax lien. So far as that issue is concerned, it is more likely that reference to "existing law" was to the specific and then unchallenged rule announced by the Second Circuit in *United States* v. *Sands*, *supra*, and by other courts in other cases holding the trustee to have the rights of a judgment creditor.[15] As we have already noted, *Gilbert* is not inconsistent with the rule announced in *Sands*.

In recent years, and since the view began to spread that *Gilbert* compelled exclusion of the trustee from the benefits of § 6323, legislation has been introduced expressly to reiterate the trustee's power to upset unrecorded federal tax liens.[16] Such legislation was proposed

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tained a judgment in the conventional sense." H. R. Rep. No. 1337, 83d Cong., 2d Sess., to accompany H. R. 8300, p. A407. See Treas. Reg. § 301.6323–1, incorporating the material rejected by the Eighty-third Congress.

[14] S. Rep. No. 1622, 83d Cong., 2d Sess., to accompany H. R. 8300, p. 575; H. Conf. Rep. No. 2543, 83d Cong., 2d Sess., to accompany H. R. 8300, p. 78.

[15] *E. g.*, *Sampsell* v. *Straub*, 194 F. 2d 228, 231 (C. A. 3d Cir.), cert denied, 343 U. S. 927; *McKay* v. *Trusco Finance Co.*, 198 F. 2d 431, 433 (C. A. 5th Cir.); *In re Lustron Corp.*, 184 F. 2d 789 (C. A. 7th Cir.), cert. denied *sub nom. Lafayette Steel Co.* v. *Lustron Corp.*, 340 U. S. 946.

[16] On two occasions the proposed legislation was approved by the appropriate House and Senate committees, and one bill received the assent of both Houses. See H. R. 7242, 86th Cong., 1st Sess., § 6, vetoed by President on September 8, 1960, 106 Cong. Rec. 19168; H. R. 394, 88th Cong., 2d Sess., § 6; H. R. 136, 89th Cong., 1st Sess., § 6.

not to alter the statutory scheme, but to remove what was thought to be an erroneous gloss placed upon it by the courts. Thus, both Senate and House committee reports accompanying a recent bill, H. R. 394, 88th Cong., reflect the belief that those decisions upon which the Government now relies "would appear to be contrary to the legislative purpose which gave the trustee all the rights of an ideal judicial lien creditor." [17]

In light of these legislative materials—the adoption of the phrase "judgment creditor" in both statutes, the legislative broadening of § 70c in 1950, and the expressions of congressional discontent with recent decisions excluding the trustee from § 6323—we are persuaded that, read together, § 6323 and § 70c entitle the trustee to prevail over unrecorded federal tax liens.

The Government seeks to ward off this result with the argument that so to read the statutes is to confer upon certain classes of creditors "windfalls" unwarranted by the equities of their situation. The question may, however, be stated less invidiously than the argument indicates: it is whether the Government, unlike other creditors, and contrary to the general policy against secret liens, should be given advantage of a lien which it has not recorded as of the date of bankruptcy.[18] It is true that the consequences of depriving the United States of its secret lien is to improve the relative position of creditors—if there are any not already protected by § 6323—whose security was obtained subsequent to the Government's lien and who, once the federal lien is invalidated, have a prior claim to the secured assets. And our decision will enhance the possibility that there

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[17] H. R. Rep. No. 454, 88th Cong., 1st Sess., p. 10; S. Rep. No. 1133, 88th Cong., 2d Sess., p. 11.

[18] In enacting the predecessor of § 6323 in 1913, Congress seems generally to have answered this question in the negative—and against secret liens. See H. R. Rep. No. 1018, 62d Cong., 2d Sess., pp. 1-2.

will be something in the bankrupt's estate for those claimants whose priorities are higher than that afforded unsecured tax claims,[19] as well as for state and local tax claims which share with the Federal Government the priority in § 64a (4), 11 U. S. C. § 104 (a)(4). Whether this result is inadvisable need not detain us,[20] for the question is one of policy which in our view has been decided by Congress in favor of the trustee. In any event, it is possible for the Government in cases which it deems appropriate, to avoid a result which it regards with unhappiness by promptly filing notice of its lien.[21] Should experience indicate that inclusion of the trustee

[19] See §§ 64a (1)–(3), 11 U. S. C. §§ 104 (a)(1)–(3), giving priority to claims for administrative expenses, wages, and certain creditors' expenses. The claims of general creditors are, of course, in no way affected by our decision. And in some circumstances administrative expense and wage claimants would in any case prevail over the Government's lien. See n. 3, *supra*.

[20] We note that failure of the Government to record its lien may work a hardship upon persons subsequently extending credit in ignorance of the unrecorded lien, and that nondisclosure may induce others to incur administrative or other expenses which they would not incur if there were no hope of repayment. Moreover, state and local governments might reduce their claims to judgment if they knew of the existence of a federal lien. See Memorandum of Chairman, Drafting Committee of National Bankruptcy Conference, contained in S. Rep. No. 1123, 88th Cong., 2d Sess., to accompany H. R. 394, pp. 24–25.

[21] In its letter to Senator Eastland opposing H. R. 394, dated September 8, 1961, the Treasury asserted that "The Service has, as a matter of administrative practice, exercised forebearance as a creditor in cases when there exists a reasonable possibility that the business can regain financial stability. Enactment of the proposed amendments . . . could very well force the service to change this practice, which it is believed has been proved by experience to be highly desirable." S. Rep. No. 1133, 88th Cong., 2d Sess., p. 18. This same argument was made to an earlier Congress and rejected. See letter from Treasury, dated Aug. 9, 1960, in opposition to H. R. 7242, contained in S. Rep. No. 1871, 86th Cong., 2d Sess., p. 36.

within § 6323 is inadvisable, the fact will not be lost upon Congress.

The Government advances one last and quite novel[22] argument predicated upon § 67b of the Bankruptcy Act, 11 U. S. C. § 107b (1964 ed.), which provides:

> "The provisions of section 60 of the Act to the contrary notwithstanding, statutory liens [including those] for taxes and debts owing to the United States or to any State or any subdivision thereof . . . may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four prior months prior to the filing of the petition . . . . Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws . . . ."

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[22] In the Court of Appeals the Government advanced, as an alternative basis for disposition of the case, the contention that pursuant to § 67b the alleged filing of notice in February of 1961 retroactively validated the lien as against the trustee. The court declined to reach the merits of this claim, noting that it had not been presented either to the referee or to the District Court and that there was no proof of record with respect to the alleged February filing. 335 F. 2d, at 314.

The § 67b argument raised in this Court differs from that rejected below, for that subsection is now cited to us as an aid in construing the relationship between § 70c and § 6323. Insofar as it is relevant to the particular problem of statutory construction presented by this case, we regard the § 67b argument as properly before us, for "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States* v. *Fisher*, 2 Cranch 358, 386 (Marshall, C. J.). See also *United States* v. *Hutcheson*, 312 U. S. 219; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 42–44; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (C. A. 2d Cir.) (L. Hand, J.).

The contention is that the lower court's reading of § 70c and § 6323 cannot be correct, for it precludes the possibility which appears to be contemplated by § 67b—that a federal tax lien not perfected until after bankruptcy may nevertheless be "valid against the trustee." We find no such inconsistency. The purpose of § 67b, insofar as tax claims are concerned, is to protect them from § 60, 11 U. S. C. § 96 (1964 ed.), which permits the trustee to avoid transfers made within four months of bankruptcy. Thus § 67b permits an otherwise inchoate federal tax claim to be "perfected" by assessment and demand within the four months prior to bankruptcy or afterwards.[23] It does not nullify or purport to nullify the consequences which flow from the Government's failure to file its perfected lien prior to the date when the trustee's rights as a statutory judgment creditor attach—namely, on filing of the petition in bankruptcy.[24] There is no indication in the language of § 67b, in the legislative history or in decisions of any court, that the subsection was intended to affect the construction or application of § 6323. In any event, we should hesitate to read § 67b as relevant to the relationship between § 70c and § 6323, for Congress in the very legislation proposed to clarify the trustee's rights under § 6323 did consider § 67b, and evidenced no awareness of interrelationship or of inconsistency.[25]

Affirmed.

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[23] See *Simonson* v. *Granquist*, 369 U. S. 38, 41; 4 Collier, *op. cit. supra*, ¶ 67.20, at 183; cf. *Lewis* v. *Manufacturers National Bank*, 364 U. S., at 609.

[24] 4 Collier, *op. cit. supra*, ¶ 67.26, at 283–286, and ¶ 70.48, at 1407.

[25] See legislative materials cited at notes 11, 16, and 17, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 17.—October Term, 1965.

United States, Petitioner, *v.* Ray F. Speers, Trustee in Bankruptcy of the Kurtz Roofing Company, etc.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December 13, 1965.]

Mr. Justice Black, dissenting.

Section 6323 of the 1954 Internal Revenue Code provides that an unfiled tax lien is not "valid as against any mortgagee, pledgee, purchaser or judgment creditor . . . ." The Court here holds that a bankruptcy trustee must be treated as if he were a "judgment creditor" thereby reducing government tax claims to the level of unsecured creditors. I am unable to agree. A bankruptcy trustee cannot be treated as a judgment creditor except by giving that term an entirely artificial, fictional meaning. The Court justifies this extraordinary twist of meaning by reference to § 70c of the Bankruptcy Act, 11 U. S. C. § 110 (c). That section, so far as here pertinent, provides:

> "c. . . . The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

This language gives no intimation of a purpose to destroy a valid tax lien such as the Government had here

when bankruptcy occurred. The section's terms simply show a purpose to make sure that all the property the bankrupt had before bankruptcy will be vested in the trustee. It stretches this language entirely too much to say it was intended to change the law so drastically that the mere appointment of a trustee could render invalid a government tax lien which was perfectly valid the moment before bankruptcy. Nor can this section fairly be read as an attempt by Congress to nullify valid government tax liens by placing the claims of all unsecured creditors of the bankrupt on the same level as valid tax liens. In writing § 70c Congress was amending the bankruptcy law, not the government tax lien law that dates back nearly 100 years. I still think, as we said in *United States* v. *Gilbert Associates*, 345 U. S. 361, 364, that in enacting the predecessor of § 6323 Congress used the words "judgment creditor" in "the usual, conventional sense of a judgment of a court of record . . . ." The Second, Third, and Ninth Circuits have so construed this section. I think they were right. The Court today gives frail and inadequate support, I think, for its judicial destruction of the Government's congressionally created lien.

I would reverse this judgment.